129-104

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. ~~300.~~ 93

GEORGE W. FARNSWORTH, PLAINTIFF IN ERROR,

vs.

THE TERRITORY OF MONTANA.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF MONTANA.

FILED OCTOBER 9, 1885.

SUPREME COURT OF THE UNITED STATES.

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No. 360.

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THE TERRITORY OF MONTANA.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF MONTANA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, NOVEMBER 10, 1887.

1 In the First Judicial District Court, Gallatin County, Montana Territory.

TERRITORY OF MONTANA, Plaintiff,

vs.

GEORGE W. FARNSWORTH, Defendant.

Be it remembered that on the 21st day of June, 1883, this case came on to be heard upon a complaint which was filed in the probate court of said county, which said complaint is and was in the words and figures following—that is to say:

Complaint.

In the Probate Court in and for Gallatin County, Montana Territory.

TERRITORY OF MONTANA *vs.* GEORGE W. FARNSWORTH.

Personally appeared before me this day Th. R. Edwards, district attorney of the first judicial district of Montana Territory, who, first being duly sworn, complains and says, upon his information and
2 belief, that one George W. Farnsworth, a commercial traveller and commercial agent of Auerbach, Finch and Van Slyck, of the city of St. Paul, in the State of Minnesota, on or about the — day of May, A. D. 1883, at Livingston, in the county of Gallatin, Montana Territory, committed the crime of misdemeanor, in that the said George W. Farnsworth did offer to sell at said Livingston, in said county and Territory, on or about said last-mentioned day, goods, wares, and merchandise to be delivered at a future time without first having obtained license from the treasurer of said county of Gallatin and Montana Territory; all of which is contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the people of the Territory of Montana.

Said complainant, therefore, prays that a warrant may be issued for the arrest of the said George W. Farnsworth, and that he may be dealt with according to law.

TH. R. EDWARDS.

Subscribed and sworn to before me this 18th day of May, A. D. 1833.

3 J. P. MARTIN,
Probate Judge.

Endorsed: "Probate court of Gallatin county. No. 683. Territory of Montana *vs.* George W. Farnsworth. Complaint. Filed May 18, 1883. J. P. Martin, *ex officio* clerk."

And there was also heretofore, to wit, with said complaint, May 22, 1883, filed herein, the said case having been brought here by

appeal by the said defendant from the judgment of said probate judge, a transcript of the record and proceedings of said probate judge in said case, which said transcript is in the words and figures following—that is to say:

At the court-house, in the county of Gallatin, on the 25th day of May, A. D. 1883, before the Hon. J. P. Martin, judge of said court, the following proceedings were had:

In the Probate Court of the County of Gallatin, Territory of Montana.

TERRITORY OF MONTANA *vs.* GEORGE W. FARNSWORTH.

4 Be it remembered that on the 18th day of May, 1882, complaint was made in this action by T. R. Edwards, charging the defendant with offering to sell goods, wares, and merchandise without first procuring license therefor; whereupon a warrant of arrest was issued and placed in the hands of the sheriff of Gallatin county for service, and on the same day defendant was brought before the court; T. R. Edwards, district attorney, appearing for the Territory, and Messrs. Luce and Armstrong for defendant.

Defendant was duly and lawfully arraigned to the complaint and pleads not guilty.

Trial set for the 21st day of May, A. D. 1883, at 10 o'clock a. m.

MAY 21, 1883.

Parties present before the court and announced themselves ready.

Defendant, by his attorney, files a demurrer to said complaint on the ground that said complaint does not state facts sufficient to constitute a public offence. The demurrer overruled. No jury having been asked for or demanded, the court proceeded to try the cause.

5 Two witnesses sworn and examined on part of plaintiff, and both parties rested. The court finds the defendant guilty as charged in the complaint; and it is therefore considered and adjudged that for said offence the said defendant pay a fine of fifty dollars and costs of this prosecution, seventeen & $\frac{70}{100}$ dollars, and stand committed till said fine and costs be paid. And immediately thereafter defendant files a motion for arrest of judgment; motion overruled. Defendant then gave verbal notice of appeal, and on the same day an appeal bond for costs and the appearance of defendant at the next term of the district court to be held in and for the county of Gallatin in the penal sum of seven hundred dollars, with Peter Koch and Lester S. Willson, as sureties.

(Signed) J. P. MARTIN,
Probate Judge.

Fine & costs in judgment:

Fine	$50 00
Sheriffs on warrant	2 40
Probate judge's fees	15 30
Total	$67 70

6 I, J. P. Martin, *ex officio* clerk of the probate court of the county of Gallatin, do hereby certify that the foregoing is a full, true, and correct copy of an order made and entered in the minutes of the said probate court in the above-entitled action on the date mentioned in the caption hereof.

In witness whereof I have hereunto set my hand and seal of said court this 21st day of May, A. D. 1883.

[L. S.] J. P. MARTIN,
Ex officio Clerk.

Endorsed: No. 566, dist. court. No. 683, probate court, county of Gallatin. Territory of Montana *vs.* George W. Farnsworth. Certified copy of order. Filed May 22d, 1883. Theo. Muffly, clerk, by E. M. Gardner, deputy clerk.

And thereupon, — said 21st day of June, 1883, there was also filed in this case in this court an agreed statement of facts in the nature of a special verdict, which said statement of facts in the nature of a special verdict is as follows, to wit:

7 THE TERRITORY OF MONTANA
against
GEORGE W. FARNSWORTH.

In the foregoing case the following facts are found:

1. That the defendant was at the time alleged in the complaint herein a commercial traveller engaged at Livingston, Gallatin county, Montana, in conducting his said vocation, as follows and not otherwise:

2. That Auerbach Finch and Van Slyck are a mercantile firm resident at St. Paul, in the State of Minnesota, engaged there in the sale of goods, wares, and merchandise, where each member of said firm reside, each being a citizen of the United States and also of the said State of Minnesota.

3. That the goods belonging to said firm for sale are at said St. Paul, and were at said St. Paul at the time of the commission by the defendant of the acts herein found to have been committed.

8 4. That the defendant was then and ever since hath been a citizen of the United States and a resident of the State of Wisconsin and a citizen thereof.

5. That as a commercial traveller for said Auerbach, Finch and Van Slyck, with samples of their goods aforesaid in said St. Paul, said defendant, on the — day of May, 1883, came to Livingston, in said Gallatin county, where he did exhibit said samples of said goods, and did represent and affirm them to be fair samples of the goods then owned and possessed in said St. Paul by said Auerbach, Finch and Van Slyck, and which said goods then were there, to wit, at said St. Paul, and then had for sale, and did then and there, to wit, at Livingston aforesaid, on the date aforesaid, solicit of one John Doe, then and there being a merchant, that he give to said defendant an order for divers and sundry of the said goods, wares, and mer-

chandise of said Auerbach, Finch and Van Slyck, then being at St. Paul as aforesaid, and did then and there obtain such other, and did then and there agree that the said defendant would forward the said order to *the* Auerbach, Finch and Van Slyck, and that if
9 said order should be accepted by said Auerbach, Finch and Van Slyck said goods in said order mentioned would be delivered to said John Doe at the warehouse of the Northern Pacific Railroad Company at St. Paul, to be shipped to said John Doe at Livingston aforesaid, and that said Auerbach, Finch and Van Slyck were at liberty to reject or accept said order.

6. That none of said goods were then and there delivered at Livingston aforesaid, nor was it the agreement or understanding that the same were to be then and there delivered, but it was agreed that the said order was to be by said defendant forwarded from said Livingston to said St. Paul as aforesaid, when and where the said goods were to be shipped from Minnesota to Montana as aforesaid.

7. That the defendant, as aforesaid, was the instrumentality by which Auerbach, Finch and Van Slyck consum-ated as well as inaugurated the transaction aforesaid, by means whereof they obtained said order for the sale of their goods should they ac-
10 cept said order and sell said goods.

8. That for the foregoing business the defendant did not at first nor at all obtain a license from the treasurer of Gallatin county.

9. The foregoing are all the facts in the case, and they are explicitly agreed to and found, and the judgment of the court is to be based upon them and no other facts whatever, and a jury is hereby expressly waived.

TH. R. EDWARDS,
District Attorney 1st Judicial District, Montana Territory.
SANDERS & CULLEN,
With whom are LUCE & ARMSTRONG,
Att'ys for Defendant.

Endorsed: "566. Territory of Montana *vs.* George W. Farnsworth. Filed June 21, 1883. Theo. Muffly, clerk, by E. M. Gardner, dep. clerk."

11 *Judgment of the Court.*

Title of cause.

This cause having been argued by counsel upon an agreed statement of facts and submitted to the court, it is now here considered that the defendant is guilty as charged in the complaint, and defendant is sentenced to pay a fine of $50.00 and all costs of prosecution. A stay of proceedings is granted until appeal is perfected.
June 23, A. D. 1883.

And thereupon the jury having been waived and the facts being as aforesaid agreed on upon the said papers and none other, whereupon, on consideration of the case, the defendant orally objected to the judgment in said case against him for the following reasons, to wit:

1. That there was no indictment preferred or found against him in this case by a grand jury and endorsed or found "a true bill."

2. That the facts found or agreed on do not bring the de-
12 fendant within the purview of the provisions of the act of the Legislative Assembly of the Territory of Montana entitled "An act to provide for licensing commercial travellers," approved July 22, 1879, and that, therefore, under the facts the defendant is not guilty of an infraction of said law.

3. That in its operation upon the defendant there is, if not in form and by words, discrimination against him and in favor of citizens of Montana, yet that there is, in fact, and by the difference of the commerce carried on by this defendant and citizens of Montana, such discrimination against this defendant and those situated like unto him.

4. That the act is beyond the authority of the Legislative Assembly of Montana to pass and apply to parties engaged in the business which defendant, by the agreed facts, carried on in said Gallatin county, Montana.

5. That the enactment is void; that it is void as to non-resident citizens of other States, who are here only as instrumentalities of interstate commerce.

6. That the defendant is not guilty as charged.

13 On consideration whereof the court, sitting as a jury, did hold and find the defendant guilty and did render judgment against him as for a fine in the sum of fifty dollars and for his costs; to which finding and judgment of the court the defendant then and there excepted, and prays that this his bill of exceptions be signed, sealed, and made a part of the record, which is done accordingly, and the defendant then and there in open court giving notice of his intention to appeal this case to the supreme — of the Territory of Montana, and praying the court to fix an undertaking to be given for such appeal and the amount thereof. The same is fixed at $400.00 *hundred dollars.*

D. S. WADE, *Judge.*

Endorsed: "Territory of Montana *vs.* George W. Farnsworth. Bill of exceptions. Filed June 23, 1883. Theo. Muffly, clerk, by E. M. Gardner, deputy clerk."

14 *Notice of Appeal.*

In the First Judicial District Court, County of Gallatin, Territory of Montana.

THE TERRITORY OF MONTANA, Plaintiff,
vs.
GEORGE W. FARNSWORTH, Defendant.

To the clerk of said district court and to Thomas R. Edwards, Esq., district attorney for said judicial district, the attorney for the Territory of Montana in this action.

Please take notice that George W. Farnsworth, the defendant in

the above-entitled action, hereby appeals to the supreme court of this Territory from the decision and judgment therein made and entered in the said district court on the 23d day of June, A. D. 1883, in favor of the plaintiff and against the defendant in said action, and from the whole thereof.

SANDERS & CULLEN AND
LUCE & ARMSTRONG,
Att'ys for the said Defendant.

Acknowledgements of Service.

15 "Received copy of the within notice, and service of same is hereby acknowledged and accepted this 30th day of June, A. D. 1883.

THEO. MUFFLY,
Clerk of said Court,
By E. M. GARDNER,
Dep. Clerk."

I hereby acknowledge receipt of a copy of the within notice of appeal, and accept service of said notice. Dated June 30, 1883.

TH. R. EDWARDS,
District Attorney, 1st Judicial District, Montana Territory,
The Attorney Prosecuting for the Territory in the Within-Entitled Action.

Filed June 30, 1883.

Undertaking on Appeal.

Title of cause. Title of court.

Whereas the said George W. Farnsworth, defendant in this action, was, on the 23d day of June, A. D. 1883, before the Hon. Decius S. Wade, judge of said court, sitting as a jury, convicted of the crime of offering to sell at Livingston, in said county of
16 Gallatin, on or about the — day of May, 1883, goods, wares, and merchandize to be delivered at a future time, as a commercial traveller and commercial agent, without first having obtained a license from the treasurer of said county of Gallatin; and, upon said conviction, it was ordered and adjudged by the said court that said George W. Farnsworth pay a fine in the sum of fifty dollars and the costs of the action, taxed at $—, and judgment was entered against said George W. Farnsworth in said action in said district court in favor of the Territory of Montana on the 23d day of June, 1883, for fifty dollars as for a fine and $—, the costs of said action; and whereas the said George W. Farnsworth is desirous and is about to appeal from said decision and judgment of said judge and said district court to the supreme court of the Territory of Montana: Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, Nelson Story and Peter Koch, of the city of Bozeman, county of Gallatin and Territory of Montana, do hereby, jointly and severally, undertake and promise, on the part of the ap-

pellant, the said George W. Farnsworth, that the said George
17 W. Farnsworth shall and will, if said judgment shall be affirmed or modified or if said appeal shall be dismissed by the said supreme court, well and truly pay or cause to be paid the fine aforesaid, the sum of fifty dollars, or such part of said fine as the said supreme court may direct, and such costs as may be awarded against said George W. Farnsworth on the appeal, and in all respects perform and satisfy said judgment in such manner as said supreme court may direct; or that, in case the judgment shall be reversed and a new trial ordered and the case be remanded for a new trial, the said George W. Farnsworth will appear in the court to which the case may be remanded and submit himself to the orders and processes thereof, and for all of which, for the considerations aforesaid, we promise and undertake in the sum of four hundred (400) dollars, to which amount we acknowledge ourselves, jointly and severally, bound.

Dated this 30th day of June, A. D. 1883.

NELSON STORY. [SEAL.]
PETER KOCH. [SEAL.]

18 Here follows justification of sureties.

TERRITORY OF MONTANA, } ss:
County of Gallatin, }

I, Theo. Muffly, clerk of the district court of the first judicial district of the Territory of Montana, in and for the county of Gallatin, do hereby certify that the foregoing pages, numbered from 1 to —, inclusive, contain a full, true, and correct transcript of certain of the pleadings, records, and proceedings filed, made, and had in said court in the case of The Territory of Montana, plaintiff, against George W. Farnsworth, defendant.

In testimony whereof I have hereunto set my hand and affixed the seal of the court this 13th day of August, A. D. 1883.

[SEAL.] THEO. MUFFLY, *Clerk*,
By E. M. GARDNER, *Dep'ty Clerk*,

19 In the Supreme Court of Montana Territory. August Term, 1884.

TERRITORY OF MONTANA, Respondent,

vs.

GEORGE W. FARNSWORTH, Appellant.

Be it remembered that in the present term of August, A. D. 1884, of said supreme court the above entitled cause was brought into said court by virtue of an appeal from the judgment therein entered in the district court of the first judicial district of said Territory within and for the county of Gallatin; and, the said cause coming on to be heard before the court on the transcript of the record in said cause of the court below, the same was argued by counsel and submitted; whereupon the court took said cause under advisement.

And afterwards, to wit, at the January, 1885, term of said supreme court, said cause came on for the decision of the court on appeal. The court delivered its opinion therein in writing, of which the following is a copy, viz:

20 *Opinion of the Court by Galbraith, Justice.*

In the Supreme Court of Montana Territory. January Term, 1885.

TERRITORY OF MONTANA, Respondent,

vs.

GEORGE W. FARNSWORTH, Appellant.

This is an appeal from a judgment rendered by the court of the first judicial district affirming the judgment of the probate court of Gallatin county, whereby a penalty of fifty dollars was imposed upon the appellant for the violation of "An act to provide for licensing commercial travellers," approved July 22, 1879, and hereinafter given.

In this case the following facts were agreed upon:

1. That the defendant was, at the time alleged in the complaint herein, a commercial traveller engaged at Livingston, Gallatin county, Montana, in conducting his said vocation as follows, and not otherwise.

21 2. That Auerbach, Finch and Van Slyck are a mercantile firm, resident at St. Paul, in the State of Minnesota, engaged there in the sale of goods, wares, and merchandise, where each member of said firm reside, each being a citizen of the United States and also of the said State of Minnesota.

3. That the goods belonging to said firm for sale are at said St. Paul, and were at said St. Paul at the time of the commission by the defendant of the acts herein found to have been committed.

4. That the defendant was then and ever since hath been a citizen of the United States and a resident of the State of Wisconsin, and a citizen thereof.

5. That as a commercial traveller for said Auerbach, Finch & Van Slyck, with samples of their goods aforesaid in said St. Paul, said defendant, on the — day of May, 1883, came to Livingston, in said Gallatin county, where he did exhibit said samples of said goods and did represent and affirm them to be fair samples of the goods then owned and possessed in said St. Paul by said Auerbach,

22 Finch & Van Slyck, and which said goods then were there, to wit, at said St. Paul, and there had for sale, and did then and there, to wit, at Livingston aforesaid, on the date aforesaid, solicit of one John Doe, then and there being a merchant, that he give to said defendant an order for divers and sundry of the said goods, wares, and merchandise of said Auerbach, Finch & Van Slyck, then being at St. Paul as aforesaid, and did then and there obtain such order, and did then and there agree that the said defendant would forward the said order to the said Auerbach, Finch and Van Slyck, and that if said order should be accepted by said

Auerbach, Finch and Van Slyck said goods in said order mentioned would be delivered to said John Doe, at the warehouse of the Northern Pacific Railroad Company at St. Paul, to be shipped to said John Doe, at Livingston aforesaid, and that said Auerbach, Finch & Van Slyck were at liberty to reject or accept the order.

6. That none of said goods were then and there delivered at Livingston aforesaid, nor was it the agreement or understanding
23 that the same were to be then and there delivered; but it was agreed that the said order was to be by said defendant forwarded from said Livingston to said St. Paul as aforesaid, when and where the said goods were to be shipped from Minnesota to Montana as aforesaid.

7. That the defendant as aforesaid was the instrumentality by which Auerbach, Finch & Van Slyck consummated, as well as inaugurated, the transaction aforesaid, by means whereof they obtained said order for the sale of their goods, should they accept said order and sell said goods.

8. That for the foregoing business the defendant did not at first or at all obtain a license from the treasurer of Gallatin county.

It is claimed that the above facts do not bring the defendant within the purview or provisions of the foregoing act.

The act, or so much thereof as it is necessary to quote, is as follows: "Every commercial traveller, agent, drummer, or other
24 person selling or offering to sell any goods, wares, or merchandise of any kind to be delivered at some future time, or carrying samples and selling or offering to sell goods, wares, or merchandise of any kind similar to said *to said* samples, to be delivered at some future time, shall, before carrying on such business, pay a license therefor of twenty-five dollars in each county where such business may be transacted. Such payment shall be made to and such license issued by the county treasurer, and the license so issued shall authorize the person named therein to carry on the said business of a commercial traveller in said county for the period of three months from the date thereof; and it is hereby made the duty of every justice of the peace, constable, sheriff, and all peace officers to demand the license of any such commercial traveller, drummer, agent, or other person who has sold or is offering to sell goods, wares, or merchandise in his county, and if such person be found not to
25 have a license, as required by this act, or if, upon demand made by any such officer, he shall not exhibit the same, the person so offending shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined in any sum not less than fifty dollars nor more than one hundred dollars, in the discretion of the court."

The agreed statement of facts, stripped of its verbiage and condensed into a form sufficiently comprehensive to present the question raised is, in substance, as follows:

B is engaged in the sale of merchandise. A is a commercial traveller carrying samples of B's merchandise and his agent to solicit orders for his goods. A exhibits the samples to and solicits and obtains an order for goods of the same character as the samples from C. This constitutes an offer by A to sell the goods.

The above state of facts must have this signification, if agency acts and words have any meaning. It is not necessary, in order that the offer to sell should be within the purview of the stat-
26 ute, that the goods should be the property of A. It is sufficient if the offer be to sell any goods, wares, or merchandise. We are, therefore, of the opinion that the facts stated bring the appellant within the meaning of the above statute.

The transcript shows that this case was commenced in the probate court of Gallatin county, which had jurisdiction thereof, upon a complaint filed therein. This is in accordance with the laws of the Territory: "Prosecutions in the probate court or justice of the peace courts shall be by complaint." Sec. 5, 3rd Div., Cr. Prac. Rev. Stats., 288.

This is a bare misdemeanor; it is not "a capital or otherwise infamous crime," as mentioned in sec. 5 of the amendments to the Constitution of the United States. A presentment or indictment by a grand jury was, therefore, not required. The principal question, however, presented is whether or not this act is in conflict with the Constitution of the United States. It is contended—

1. That this act is in conflict with that clause in the Con-
27 stitution which provides that "the citizens of each State shall be entitled to all the privileges and immunities of the citizens of the several States." And also with those provisions thereof which provide that Congress shall have power "to regulate commerce with foreign nations and among the several States and with the Indian tribes," and that "no State shall, without the consent of Congress, lay any impost or duties on imports and exports, except what may be absolutely necessary for exercising its inspection laws." The presumption is always in favor of the validity of an act of the Legislature, and the burden is upon the party claiming that it is otherwise to show that it is so, clearly and satisfactorily. An act should not be adjudged unconstitutional except where it is plainly repugnant to the fundamental law. "In a case of this kind it is only with the power of the Legislature viewed in relation to the fundamental law and not with the expediency or propriety of its legislation that the court has to do. These are matters for
28 the consideration of the Legislature itself when it enacts the law."

We do not think that the act is in conflict with the first clause of the Constitution above quoted, as it does not discriminate against the citizens of other States and Territories.

We can see no reason why this Territory cannot subject all persons who come within its jurisdiction, although citizens of other States and Territories, for the purpose of engaging in the kind of business mentioned in the act, to the same conditions as to payment of a license tax therefor as are imposed upon its own citizens. The act requires the payment of a license for the purchase of a privilege to do the kind of business mentioned therein just as in the case of licenses required by law to be purchased for the privilege of pursuing a particular trade, profession, or occupation. The act is not obnoxious to the objection that it is discriminating, for its provisions

apply to all persons pursuing the occupation mentioned therein alike, whether citizens of other States and Territories or of the Territory of Montana, and to the goods, wares, and merchandise
29 of this Territory as well as those of foreign production and manufacture. This act does not, therefore, come within the purview of the decision of the Supreme Court of the United States in Ward *vs.* Maryland, 12 Wall., 418, where it was held that a statute of the State of Maryland was unconstitutional, as discriminating against the citizens of other States, which made it a penal offence in any person not being a permanent resident in the State to sell, offer for sale, or expose for sale within certain limits in the State any goods, wares, or merchandise whatever other than agricultural products and articles manufactured in Maryland within the said limits, either by card, sample, or other specimen, or by written or printed trade list or catalogue, whether such person be the maker or manufacturer or not, without first obtaining a license so to do. This statute plainly imposed a discriminating tax upon persons trading in the manner mentioned therein within certain limits in the State, who were residents of other States; and it was solely upon this ground that the statute was
30 declared unconstitutional, and Justice Clifford, delivering the opinion of the court, says: "Taxes, it is conceded in those cases—referring to Woodruff *vs.* Parborn, 8 Wall., 139, and Hinson *vs.* Lott, *Id.*, 151—may be imposed by a State on all sales made within the State, whether the goods sold were the produce of the State imposing the tax or of some other State, provided the tax imposed is uniform. But the court at the same time decides that a tax discriminating against the commodities of the citizens of the other States of the Union would be inconsistent with the provisions of the Federal Constitution, and the law imposing such a tax would be unconstitutional and invalid."

No question is made in this case as to the uniformity of the tax, and it does not discriminate against either the person or property of other States. Neither, in respect to discrimination, is the act under consideration similar in any way whatever to the act declared unconstitutional in the case of Welton *vs.* Missouri, 91 U. S., 275.
31 The act in question in that case required "the payment of a license tax from persons who deal in the sale of goods, wares, and merchandise which are not the growth, product, or manufacture of the State by going from place to place to sell the same in the State, and required no such license tax from persons selling in a similar way goods which are the growth, produce, or manufacture of the State. The statute in question differs from the one in the case above stated in that it does not discriminate against the sale of goods, wares, and merchandise which are not the growth, product, or manufacture of this territory." It was upon the ground of discrimination that this case was decided. At the close of his opinion in this case Field, justice, speaking for the Court, says: "As the main object of that commerce (*i. e.*, interstate commerce) is the sale and exchange of commodities, the policy thus established would be defeated by discriminating legislation like that of Missouri;" and

then referring to the case of Woodruff *vs.* Parborn, *supra*,
32 continues: "Mr. Justice Miller, speaking for the Court, after observing with respect to the law of Alabama then under consideration that there was no attempt to discriminate injuriously against the products of other States or the rights of their citizens, and the case was not therefore an attempt to fetter commerce among the States or to deprive the citizens of other States of any privilege or immunity, said: 'But a law having such operation would, in our opinion, be an infringement of the provisions of the Constitution which relate to those subjects and therefore void.'"

The act of the Legislature in question, unlike those declared unconstitutional in both of the above cases, does not discriminate between persons who are citizens of this Territory and citizens of other States and Territories, or between goods, wares, and merchandise which are the product and manufacture of other States and Territories and which are the product and manufacture of this Territory. It is not, therefore, in our opinion, in conflict with that clause of the Constitution of the United States which provides that
33 "the citizens of each State shall be entitled to all privileges and immunities of citizens of the several States." It remains to consider whether or not this act is in conflict with those provisions of the Constitution of the United States, that Congress shall have power "to regulate commerce with foreign nations and among the several States," and that "no State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

The act requires the payment of a license fee for each county in which the business of selling by samples is conducted, which license is to continue in force for the period of three months from its date. In respect to the clauses of the Constitution referred to, a State is as much subject to their restrictions as a Territory; therefore, the reasons which apply in the one case are applicable, also, in the other.

As a general rule, the right of taxation is one of the incidents of sovereignty, and is coextensive with its exercise. The right
34 of taxation by the State, therefore, in the absence of any constitutional limitation extends to all objects which are subjected to its sovereignty. To say that a State cannot tax an individual within its jurisdiction and carrying on an occupation within its limits would be a denial of its sovereignty as a State. The individual is within the jurisdiction of the State; his business is carried on within its limits; both himself and his occupation are protected by the State, and his occupation may therefore be the lawful subject of State taxation. "Taxation only exacts a contribution from individuals of the State, * * * for which they receive compensation in the protection which Government affords." (County of Mobile *vs.* Kimball, 102 U. S., 691.)

The only exception to the general rule in the case of the State is where the Constitution has reserved to the General Government the right "to regulate commerce with foreign nations among the several States and with the Indian tribes," and prohibited any State

35 from laying a duty or impost on imports and exports without the consent of Congress, "except what may be absolutely necessary to execute its inspection laws." The statute in question does not assume to regulate commerce; it does not prescribe rules for the conduct of commercial transactions. It does not contemplate any restriction upon commerce. It simply imposes a tax upon an occupation exercised by all persons within the limits of the State; neither does it impose any duty or impost on imports. Certainly every duty or impost is a tax, but every tax is not a duty or impost within the meaning of that term as used in the Constitution. It may be claimed that this tax is within the constitutional prohibition, because its tendency is to increase the price of the goods imported; but this proves too much. It has been universally conceded that after imported merchandise has been removed from the original package and mingled with other goods that they are the subject of State taxation. It is sufficient
36 for the present to say generally that when the importer hs so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country it has perhaps lost its distinctive character as an import and has become subject to the taxing power of the State." Chief Justice Marshall in Brown *vs.* State of Maryland, 12 Wheaton, 419.

But the tendency of the tax in such a case is to increase the price of the goods as well. The tax in such a case enhances the price of the sale by the importer and its cost to the consumer, for it is the consumer, in the end, who must pay the tax. This fact, therefore, that the price of the goods is increased by the tax is not the true criterion by which to determine the right to tax the occupation. "No doubt every tax upon personal property or upon occupations, business, or franchises affect more or less the subjects and the operations of commerce, yet it is not everything that affects commerce that amounts to a regulation of it within the meaning of the Constitution." Justice Strong, in "State tax on railway gross re-
37 ceipts," 15 Wallace, 284. In this case it was held that a statute of a State imposing a tax upon the gross receipts of railroad companies was not repugnant to the Constitution of the United States, although such receipts came partly from freights received for transportation of goods from Pennsylvania into another State or from such other State into Pennsylvania.

Further on, in the same opinion, the same judge says: "Is, then, the tax imposed by the act of Feb'y 23, 1866, a tax upon freight transported into or out of the State or upon the owner of freight for the right of thus transporting it? Certainly it is not directly. Very manifestly it is a tax upon the railroad company, measured in amount by the extent of its business or the degree to which its franchise is exercised. That its ultimate object may be to increase the cost of transportation must be admitted. So it must be admitted that a tax upon any article of personal property that may become a subject of commerce or upon any instrument of commerce affects commerce itself. If the tax be upon the instrument such as a stage
38 coach, a railroad car, or a canal or steamboat, its tendency is to

increase the cost of transportation; still it is not a tax upon transportation and commerce, and it has never been seriously doubted that such a tax may be laid." So, in this case, the occupation taxed may be viewed as one of the instrumentalities of commerce. The profits of the occupation are made within the limits of the Territory imposing the tax; and the same reasons which are applicable in the case cited will also apply to the case at bar. The license fee exacted is not a tax upon the importer or the importation; it is the purchase of the privilege of engaging in the occupation of selling goods, wares, and merchandise, just as may be exacted in the case of auctioneers, peddlers, saloon keepers, or other trades or professions. We do not think that the decision in Brown *vs.* The State of Maryland, *supra*, applies to this case. In that case Brown was indicted under a law of the State of Maryland requiring all
39 importers of foreign articles to take out a license before selling the same "for having imported and sold one package of foreign dry goods without license so to do."

It was held that a tax upon a sale by the importer of goods imported for sale in the original package was a tax upon the goods themselves, and in this respect a violation of the Constitution in relation to the prohibition to a State to levy duties and imposts on imports; also that sale having been the object of importation the importation gave the right to sell the goods imported in the original package without taxation by the State, and therefore repugnant to that clause of the Constitution in relation to the regulation of commerce. It is plain that in such a case that the taxation of the importer for a license to sell in the original package is substantially direct impost or duty on importers. It makes no difference whether the tax is placed upon the importer in the way of a license to sell the original package or directly upon the original package itself. In such a case the power to tax could
40 be exercised to such a degree as, in substance, directly to prohibit the importation; but in the case at bar the person following the occupation taxed is not necessarily the importer; he is not necessarily the owner of the goods which, it is claimed, are indirectly taxed. His occupation is simply one of the instrumentalities of commerce by which sales are made within the meaning of the decision in "State tax on railway gross receipts," *supra*. The tax is not a direct tax upon importation. It can hardly be called an indirect tax. The license fee might be made so ex*h*orbitant that it would prohibit the occupation and not prevent the importation of goods. His occupation might cease entirely and the business of importing goods into the Territory go on uninterrupted. It will be remembered that in the rendition of the decision in Brown *vs.* Maryland, *supra*, the judges were not unanimous. A strong dissenting — was rendered by Thompson, justice. This decision has been frequently referred to in cases before the same court, and
41 while it has been upheld as authority, yet that court has often announced that its principles ought not to be applied to any state of facts which do not come plainly within the facts stated in that case. The state of facts in the case at bar is essentially

different from that of the case of Brown *vs.* Maryland. In discussing the question as to whether or not an act of a State or Territorial Legislature is in conflict with the above provisions of the Constitution, the Supreme Court of the United States has frequently declared that the line marking the boundary between the right of taxation by the State and the power of the General Government to regulate commerce and to limit the imposition of a duty or impost on imports and exports by the State is difficult to define. In Brown *vs.* Maryland, *supra*, Chief Justice Marshall, referring to this distinction, says: "The power and the restriction upon it, though quite distinguishable when they do not approach each other, may yet, like the intervening colors between white and black, ap-
42 proach so nearly as to perplex the understanding, as colors perplex the vision in marking the distinction between them; yet the distinction exists, and must be marked as the cases arise. Till they do arise it might be premature to state any rule as being universal in its application." Reference to the same figure of speech and the use in substance of the above language is had by Field, justice, in the case of Welton *vs.* State of Missouri, *supra*. In our examination of the cases which have come before the Supreme Court of the United States in which this subject has been considered, with but one or two exceptions the decisions have been made by a divided court. It would appear, therefore, that no general rule is applicable in relation to the exercise of these two powers, but that each case must be determined upon the facts as they are presented. "It is quite difficult, if not impossible, to draw any general line that will mark with any degree of precision where the commercial power of Congress ends and where the power of each State begins."

43 Hawley, C. J., in *Ex parte* Robinson, 12 Nevada, 263.

In the case of the city of New York *vs* Miln, which was an action of debt, brought in the circuit court of the State of New York, to recover from defendant the amount of certain penalties imposed by a statute of that State, Barbour, J., in delivering the opinion of the Supreme Court of the United States and discussing the distinction which existed between the case then under consideration and that of Brown *vs.* The State of Maryland, says: "It is difficult to perceive what analogy there can be between a case where the right of a State was inquired into in relation to a tax imposed upon the sale of imported goods, and one where, as in this case, the inquiry is as to its rights over persons within its acknowledged jurisdiction. The goods are the subject of commerce, the persons are not. The court did indeed extend the power to regulate commerce so as to protect the goods imported from a State tax, after they were landed and were yet in bulk; but why? Because
44 they were the subjects of commerce and because, as the power to regulate commerce, under which the importation was made, implied a right to sell, that right was complete without paying the State for a second right to sell, whilst the bales or packages were in their original form; but how can this apply to persons? They are not the subject of commerce, and, not being imported

goods, cannot fall within a train of reasoning founded upon the construction of a power given by Congress to regulate commerce, and the prohibition to the States from imposing a duty or impost on imported goods." 11 Peters, 136.

We think that the state of facts in the case at bar brings it clearly within the boundary of the sovereignty of the Territory. "The right of taxation in such a case," as was said by the supreme court of Indiana, "is inseparable from sovereignty essential to its existence, and one which all expounders of the Constitution admit to have been reserved." 4 Black, 109. "To pronounce such a law unconstitutional," says Hawley, C. J., in *Ex parte* Robinson, *supra*,
45 a case relating to a similar statute to the one in question, "because it might in some imaginable manner affect the operation of commerce, would be to surrender the principle that a State has the right, for its support, to impose a tax upon citizens who are conducting business within its jurisdiction. Such a doctrine is not, in our opinion, sustained by the reasoning of any of the cases cited by counsel. On the other hand, while the facts in many of the cases referred to are different from the case at bar, the reasoning of the courts is decidedly in favor of the views we have expressed."

In the case of Nathan *vs.* The State of Louisiana, 8 Howard, 82, where it was held that "a State law which imposes a tax on exchange and money brokers is not repugnant to the constitutional power of Congress to regulate commerce," McLean, justice, delivering the opinion of the court, says: "The right of a State to tax its own citizens for the prosecution of any particular business or profession within the State has not been doubted, and we find
46 that in every State money or exchange brokers, vendors of our own or foreign manufacture, retailers of ardent spirits, tavern keepers, auctioneers, those who practice the learned professions, and every description of property not exempted by law are taxed. * * * No one can claim an exemption from a general tax on his business within the State on the ground that the products sold may be used in commerce. * * * A cotton broker may be required to pay a tax upon his business or by way of license, although he may buy and sell cotton for foreign exportation. * * * The taxing power of a State is one of its attributes of sovereignty, and where there has been no compact with the Federal Government or cession of jurisdiction for the purposes specified in the Constitution this power reaches all the property and business within the State which are not properly denominated the means of the General Government, and, as laid down, it may be exercised at the discretion of the State. The only restraint is found in the responsibility of the members of the Legislature to their constituents. If this
47 power of taxation by a State within its jurisdiction may be restricted beyond the limitations stated on the ground that the tax may have some indirect bearing on foreign commerce, the resources of a State may be thereby essentially impaired. But State power does not rest on a basis so indefinable. Whatever exists within its territorial limits in the form of property, real or per-

sonal, with the exceptions stated, is subject to its laws; and also the numberless enterprises in which its citizens may be engaged. These are subjects of State regulation and State taxation, and there is no Federal power under the Constitution which can impair this exercise of State sovereignty."

In Woodruff *vs.* Parham, 8 Wall., 123, it was held that "the term import, as used in that clause of the Constitution which says that 'no State shall levy any imposts or duties on imports or exports,' does not refer to articles imported from one State into another, but only to articles imported from foreign countries into the United States, and that therefore 'a uniform tax imposed by
48 a State on all sales made in it, whether they be made by a citizen of it or of some other State, and whether the goods sold are the produce of that State enacting the law or of some other State, is valid."

In this case Miller, Justice, speaking for the Supreme Court of the United States, and referring to a remark by Chief Justice Marshall at the close of the opinion in Brown *vs.* Maryland, *supra*, which was "that we suppose the principles laid down in this case to apply equally to importations from a sister State," says: "If the court, then, meant to say that a tax levied on goods from a sister State which was not levied on goods of a similar character produced within the State would be in conflict with the clause of the Constitution giving Congress the right to regulate commerce among the States, as much as the tax on foreign goods then under consideration was in conflict with the authority to regulate commerce with foreign nations, we agree to the proposition." See Hinson *vs.* Lott, 8 Wall., 148, and Harris *vs.* The Mayor, 8 Wall., 110.

49 We are of opinion that the statute in question imposes a tax upon the business or occupation of the commercial traveller; that such tax is the price exacted by the Territory for the privilege allowed by it of pursuing within its limits a particular trade, business, or avocation; that it is not a duty or impost upon imports; that the individual and his occupation being within the boundary of the sovereignty of the Territory the right of taxation incident to and coextensive with that sovereignty attaches thereto.

The judgment is affirmed.

Filed Jan'y 29, 1885.

I. R. ALDEN, *Clerk.*

Thereupon judgment on appeal was duly entered in said cause in accordance with the foregoing decision in the following language, viz:

50 *Judgment on Appeal.*

In the Supreme Court of Montana Territory. January Term, 1885.

TERRITORY OF MONTANA, Respondent,

vs.

GEORGE W. FARNSWORTH, Appellant.

Be it remembered that at the August, A. D. 1884, term of this court the above-entitled cause was brought into said court by virtue of an appeal from the judgment rendered therein, in the district court of the first judicial district of said Territory, on the 23d day of June, A. D. 1883, by filing in this supreme court the transcript of the record of said district court in said cause, agreeably to the statute of said Territory and the rules of this court in such cases made and provided; and said cause coming on to be heard at said term before the court on the said transcript of record, the same was argued by counsel, and thereupon the court took said cause under advisement.

51 And afterwards, to wit, in the present term of January, in the year of our Lord one thousand eight hundred and eighty-five, said cause came on for decision and judgment on appeal. Whereupon, on consideration, it is now here ordered and adjudged by this court that the judgment of the said district court entered in this cause as aforesaid be, and the same is hereby, affirmed with costs.

And it is hereby further ordered that the said respondent, The Territory of Montana, recover against said appellant, George W. Farnsworth, — dollars for its costs herein expended, and have execution therefor.

29 January, A. D. 1885.

To the decision of said court and the rendition of the judgment aforesaid in said cause the said appellant then and there duly excepted.

And on the same day the court made certain findings of fact upon which said judgment in affirmance herein is made, which was filed, and of which said findings of fact the following is a copy, viz:

52 *Finding of Facts.*

THE TERRITORY OF MONTANA:

In Supreme Court. January Term, A. D. 1885.

THE TERRITORY OF MONTANA *vs.* GEORGE W. FARNSWORTH.

In this case the supreme court affirms the decision of the district court, and as the basis of such affirmance finds that the facts showing his guilt were as follows and not otherwise or further, to wit:

1. That the defendant was at the time alleged in the complaint herein a commercial traveler engaged at Livingston, Gallatin county,

county Montana, in conducting his said vocation as follows, and not otherwise.

2. That Auerbach, Finch and Van Slyck are a mercantile firm, resident at St. Paul, in the State of Minnesota, engaged there in the sale of goods, wares, and merchandise where each member of said firm reside, each being a citizen of the United States, and also of the said State of Minnesota.

53 3. That the goods belonging to said firm for sale are at said St. Paul and were at said St. Paul at the time of the commission by the defendant of the acts herein found to have been committed.

4. That the defendant was then and ever since hath been a citizen of the United States and a resident of the State of Wisconsin and a citizen thereof.

5. That as a commercial traveller for said Auerbach, Finch & Van Slyck, with samples of their goods aforesaid in said St. Paul, said defendant, on the — day of May, 1883, came to Livingston, in said Gallatin county, where he did exhibit said samples of said goods and did represent and affirm them to be fair samples of the goods then owned and possessed in said St. Paul by said Auerbach, Finch and Van Slyck, and which said goods then were, to wit, at said St. Paul, and there had for sale, and did then and there, to wit, at Livingston aforesaid, on the date aforesaid, solicit of one John Doe, then and there being a merchant, that he give to said de-
54 fendant an order for divers and sundry of the said goods, wares, and merchandise of said Auerbach, Finch and Van Slyck, then being at St. Paul as aforesaid, and did then and there obtain such order, and did then and there agree that the said defendant would forward the said order to the said Auerbach, Finch and Van Slyck, and that if said order should be accepted by said Auerbach, Finch & Van Slyck said goods in said order mentioned would be delivered to said John Doe, at the warehouse of the Northern Pacific Railroad Company at St. Paul, to be shipped to said John Doe, at Livingston aforesaid, and that said Auerbach, Finch & Van Slyck were at liberty to reject or accept said order.

6. That none of said goods were then and there delivered at Livingston aforesaid, nor was it the agreement or understanding that the same were to be then and there delivered, but it was agreed that the said order was to be by said defendant forwarded from said Livingston to said St. Paul as aforesaid, when and where the said goods were to be shipped from Minnesota to Montana as aforesaid.

55 7. That the defendant as aforesaid was the instrumentality by which Auerbach, Finch and Van Slyck consummated as well as inaugurated the transaction aforesaid, by means whereof they obtained said order for the sale of their goods should they accept said order and sell said goods.

8. That for the foregoing business the defendant did not at first, nor at all, obtain a license from the treasurer of Gallatin county.

9. The foregoing are all the facts in the case, and they are explicitly agreed to and found, and the judgment of the court is to be

based upon them and no other facts whatever, and a jury is hereby expressly waived.

(Signed) TH. R. EDWARDS,
Dist. Att'y 1st Judicial District, Montana Territory.
SANDERS & CULLEN,
With whom are LUCE & ARMSTRONG,
Att'ys for Defendant.

Filed June 21, 1883.

To which judgment the defendant then and there excepted. The defendant and appellant prays the court to find the facts upon
56 which the judgment is affirmed and to order that they be signed, sealed, and made a part of the record, with his exception, which is hereby done as aforesaid accordingly.

Helena, Jan'y 29, 1885.

D. S. WADE, [SEAL.]
Chief Justice.

WM. J. GALBRAITH, [SEAL.]
Asso. Justice.

And on the 17th day of July, 1885, said appellant filed herein his undertaking on appeal in the words & figures following, to wit:

57 Know all men by these presents that we, Samuel Schwab and Edward I. Zimmerman, of Helena, M. T., are held and firmly bound unto the Territory of Montana in the full and just sum of five hundred dollars, to be paid to the said Territory of Montana or its legal representative, jointly and severally, by these presents.

Sealed with our seals and dated this 29th day of March, A. D. 1885.

Whereas lately, at a term of the supreme court for the Territory of Montana, in a suit pending in said court between the *the* Territory of Montana as plaintiff and respondent and George W. Farnsworth as defendant and appellant, there was rendered a final judgment in favor of the said plaintiff and respondent and against the said defendant and appellant for the sum of fifty dollars and costs taxed at — dollars, and the said defendant having sued out a writ of error from the Supreme Court of the United States directed to the said supreme court of Montana Territory (and lodged a copy
58 thereof in the clerk's office thereof for inspection) to remove said cause to the Supreme Court of the United States to reverse said final judgment in said cause, and a citation directed to the said plaintiff citing and admonishing it to appear at a Supreme Court of the United States to be holden at Washington on the first Monday of October next:

Now, the condition of the above obligation is such that if the said defendant shall prosecute his said writ of error to effect and answer all damages and costs that may be awarded against him by reason of the suing out of said writ if he shall fail to make good his plea,

then this obligation to be void; else to remain in full force and virtue.

SAMUEL SCHWAB. [SEAL.]
EDWARD I. ZIMMERMAN. [SEAL.]

Sealed & delivered in presence of—
W. E. CULLEN.

TERRITORY OF MONTANA, }
County of Lewis & Clarke, } *ss:*

Samuel Schwab and Edward I. Zimmerman, whose names
59 are subscribed as the sureties to the above undertaking, being severally duly sworn, each for himself, says that he is worth the sum in the said undertaking specified as the penalty thereof over and above all his just debts and liabilities, exclusive of property exempt by law from execution.

SAMUEL SCHWAB.
EDWARD I. ZIMMERMAN.

Subscribed and sworn to before me this 17th day of July, A. D. 1885.

[NOTARIAL SEAL.] W. E. CULLEN,
Notary Public, M. T.

The foregoing undertaking approved and supersedeas ordered.
D. S. WADE,
Chief Justice.

On the 22d day of April, 1885, the said defendant filed herein his writ of error in the words & figures following, viz:

60 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the Territory of Montana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of Montana Territory, before you or some of you, in a cause between the Territory of Montana, plaintiff and respondent, and George W. Farnsworth, defendant and appellant, a manifest error hath happened, to the great damage of the said George W. Farnsworth, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in that behalf, do command you that, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, together with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then

and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done
61 therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 22d day of April, in the year of our Lord one thousand eight hundred & eighty-five.

[Seal of Supreme Court, Montana Territory.]

ISAAC R. ALDEN,
Clerk of the Supreme Court of Montana Territory.

Allowed by—
DECIUS S. WADE,
Chief Justice.

62 [Endorsed:] In the Supreme Court of the United States. George W. Farnsworth, pl'ff in error, *vs.* Territory of Montana, def't in error. Writ of error. Filed April 22d, 1885. I. R. Alden, clerk.

63 *Citation.*

UNITED STATES OF AMERICA, *ss:*

In Supreme Court.

GEORGE W. FARNSWORTH, Plaintiff in Error,

vs.

THE TERRITORY OF MONTANA, Defendant in Error.

[Seal Supreme Court, Montana Territory.]

To Henry N. Blake, Esq., district attorney of the first judicial district of Montana Territory, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of Montana Territory, wherein George W. Farnsworth is plaintiff and the Territory of Montana is defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice done to the parties in that behalf.

Witness Honorable Decius S. Wade, chief justice of Montana Territory, this 22d day of April, A. D. 1885.

[Seal Supreme Court, Montana Territory.]

DECIUS S. WADE,
Chief Justice.

64 Service of a copy of the within citation duly acknowledged by me on this 11th day of May, A. D. 1885.

WILLIAM H. HUNT,
Att'y Gen'l of Montana.

65 [Endorsed:] Sup. Court U. S. 1885, Oct'r term. No. 1046. Geo. W. Farnsworth, pl'ff in error, *vs.* The Territory of Montana. Citation.

[Stamped:] Office Supreme Court U. S. Filed Nov. 2, 1885. James H. McKenney, clerk.

[Endorsed:] In Supreme Court of the United States. Geo. W. Farnsworth, pl'ff in error, *vs.* The Territory of Montana, def't in error. Citation.

66 In Supreme Court of Montana Territory.

GEORGE W. FARNSWORTH, Pl'ff in Error,
vs.
THE TERRITORY OF MONTANA, Def't in Error.

I, I. R. Alden, clerk of the supreme court of Montana Territory, do hereby certify that the foregoing sixty-one pages, numbered from 1 to 61, inclusive, contain a full, true, & correct transcript of certain pleadings, records, & proceedings filed, made, and had in said court in the above-entitled action as the same appear on file and of record in my office.

Witness my hand and official seal hereunto affixed this 20th day of July, A. D. 1885.

[Seal Supreme Court, Montana Territory.]

I. R. ALDEN, *Clerk.*

Endorsed on cover: Montana Territory supreme court. No. 360. George W. Farnsworth, plaintiff in error, *vs.* The Territory of Montana. Filed October 9, 1885.

IN THE

Supreme Court of the United States.

GEORGE W. FARNSWORTH, PLAINTIFF IN ERROR,

vs.

THE TERRITORY OF MONTANA.

In Error to the Supreme Court of the Territory of Montana.

Statement of the Case.

By an act of the Territory of Montana approved July 22d, 1879, and entitled "An act to provide for the licensing of commercial travellers," it was enacted as follows:

"Every commercial traveller, agent, or drummer or other person selling, or offering to sell, any goods, wares, or merchandise of any kind to be delivered at some future time, or carrying samples and selling, or offering to sell, goods, wares, or merchandise of any kind similar to said samples to be delivered at some future time, shall, before carrying on such business, pay a license therefor of twenty-five dollars in each county where such business may be transacted." * * * "If such person be found not to have a license as required by the act * * * the person so offending shall be guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than fifty dollars, nor more than one hundred dollars, in the discretion of the court" (fols. 20, 24).

An information was filed against the plaintiff in error charging that he did offer to sell at Livingston, in the said county and Territory (Gallatin county, Montana), goods, wares, and merchandise to be delivered at a future time without having first obtained a license (fol. 2).

A demurrer was filed to the information and overruled (fol. 4).

The parties then went to trial. A jury was waived, and the court, acting on a stipulation of the parties, found, in substance, that the defendant, a resident and citizen of Wisconsin, being a commercial traveller for Auerback, Finch & Van Slyck, a firm consisting of citizens of Minnesota, and having goods for sale at St. Paul in that State, exhibited at Livingston samples of goods of the said firm in St. Paul, and solicited and obtained an order for some of the said goods, and agreed to forward the order to the firm, and agreed that if the firm accepted the order the goods would be delivered by the firm to the purchaser at the warehouse of the Northern Pacific Railroad in St. Paul, and that the firm should be at liberty to accept or reject the said order. The defendant had not obtained a license (fol. 7, *et seq.*).

At the trial it was objected—1, that the act of July 22d, 1879, is beyond the authority of the Legislative Assembly of Montana to pass and apply to parties engaged in business such as that of the defendant; 2, that the act is void as to non-resident citizens of other States who are in Montana only as instrumentalities of interstate commerce (fol. 12).

Judgment was rendered against the defendant for $50 (fol. 11).

This judgment was affirmed on appeal to the Supreme Court of the State of Montana (fol. 51).

It is stated in the opinion of the Supreme Court that it was contended that the said act was in conflict with

the clause in the Constitution of the United States, which provides that Congress shall have power to regulate commerce among the several States (fol. 27). The court sustained the validity of the act (fol. 35).

Assignment of Errors.

1. The court erred in overruling the demurrer to the information.

2. The court erred in rendering judgment against the defendant on the facts found.

3. The court erred in holding that the act of the Territory of Montana of July 22d, 1879, is not void as being in conflict with the clause of Section 8, Article I, of the Constitution of the United States, which gives power to Congress "to regulate commerce with foreign nations and among the several States and with the Territories."

And the plaintiff in error prays a reversal of the said judgment.

Argument.

1. The demurrer should have been sustained.

The charge in the information was that the plaintiff in error, without obtaining a license, offered to sell goods to be delivered at a future time, contrary to the statute of Montana. The court, by overruling the demurrer, in effect sustained the validity of the statute.

It is the law of this Court that a statute which forbids generally the offer to sell goods without a license is void, as in violation of the clause of the Constitution of the United States giving power to Congress to regulate commerce among the several States.

Robbins *v.* Shelby County, 120 U. S., 489.
Corson *v.* Maryland, 120 U. S., 502.

The latter case is on all fours with the present one. The language of the statutes of the State of Maryland and of the Territory of Montana is substantially the same. The Maryland case came up on demurrer, as the present one does.

2. On the findings of fact, the judgment should have been for the plaintiff in error.

The facts found are not distinguishable from those on which the case of Robbins *v.* Shelby County was decided.

It is submitted that the judgment should be reversed and the court below directed to give judgment on the demurrer for the plaintiff in error.

JAMES LOWNDES,
For Plaintiff in Error.

FILED
NOV 2 1888
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

October Term 1888.

GEORGE W. FARNSWORTH, Plaintiff in Error,
vs.
THE TERRITORY OF MONTANA. } No. 93.

In Error to the Supreme Court of the Territory of Montana.

Supplemental Brief.

I.—As to the Jurisdiction of this Court.

The jurisdiction of this court over the judgments and decrees of the Territorial courts is now regulated by the act of March 3d, 1885. (23 Stats., 443.) It provides that the limitation as to the value of the matter in dispute shall not apply to "any case in which is drawn in question the validity of a treaty or statute of or an authority exercised under the United States; but in all such cases an appeal or writ of error may be brought without regard to the sum or value in dispute."

The act applies also to the District of Columbia.

The act differs in important particulars from the act of February 14th, 1867, (R. S., 709,) giving jurisdiction over the judgments and decrees of State courts. But the

principle of the two acts is the same. The latter is intended to correct the State courts when they err on the side of exaggerating the authority of the State; the former, to correct courts of the United States when they make too great claim for the authority of the United States.

The present case is within the act of March 3d, 1885, for the single point in the case is the drawing in question of an authority exercised under the United States. The plaintiff in error's contention is that the statute of the Territory of Montana is invalid. The Legislature of Montana is an agent of the United States—a creature of United States law, and a statute enacted by it is the exercise of an authority under the United States. The validity of this authority is drawn in question.

See, also, Removal Cases, 115 U. S., 1.

If the statute of Montana has been duly authorized by the statute of the United States creating the Legislature of Montana, then in effect the validity of a statute of the United States is drawn in question, and the case is equally within the act of March 3d, 1885.

The writ of error was sued out on the 22d of April, 1885 (fol. 61), and it is regulated by the act of March 3d, 1885.

ON THE PRINCIPAL QUESTION.

I. The statute of Montana of July 22d, 1879 (fol. 24), is invalid because it is not authorized by the organic act creating the Territory. So much of the act as applies to this subject is in these words:

"SECTION 6. *And be it further enacted*, That the legislative power of the Territory shall extend to all rightful subjects of legislation, consistent with the Constitution of the United States and the provisions of this act."

By the very terms of the organic act, therefore, there is an exception from the grant of legislative powers of

power to legislate on those topics over which exclusive power to legislate is reserved to Congress. Such power in a Territorial legislature would not be "consistent with the Constitution of the United States."

The power to regulate commerce among the different States is clearly exclusively vested in Congress, and it is therefore excepted out of the grant of legislative power to the Legislature of Montana.

That this exclusive power in Congress of regulating commerce extends to the regulation of commerce between a State and a Territory cannot admit of any doubt. The reasons for vesting the power in Congress apply with more force to the case of commerce between a State and a Territory than between different States.

In Lougborough *v.* Blake the provision that laws should be uniform throughout the United States was held to apply to the Territories. (5 Wheaton, 319.)

Chief-Justice Marshall said:

"Does this term (*i. e.*, United States) designate the whole or any portion of the American empire? Certainly this question can admit of but one answer. It is the name given to our great Republic, which is composed of States and Territories. The District of Columbia or the territory west of the Missouri is no less within the United States than Maryland or Pennsylvania; and it is not less necessary, on the principles of our Constitution, that uniformity in the imposition of impost duties and excises should be observed in one than in the other."

In the case of California *v.* Pacific R. R. Co. (127 U. S.) the exclusive power to regulate commerce between a State and Territory was held to be vested in Congress.

It has been held that the regulation of commerce between the District of Columbia and a State is within the exclusive constitutional power of Congress.

Re. Hennick, 5 McA., 489.

It follows that Congress has not attempted to vest in the Legislature of Montana a power of taxation so broad as to give color of authority for the statute in question.

It may be argued that Congress has power under section 3, article IV, of the Constitution to make all needful rules and regulations respecting the territory of the United States; that this power includes the power to tax the commerce between a State and a Territory; that it can be and has been delegated to the Legislature of Montana, and that the statute is an exercise of that power.

Such a contention would seem to be entirely untenable. It would be strange if the Constitution, besides an express grant to Congress of a power to regulate commerce, should by implication give a power to it over that subject as a mere incident to its power to control the internal affairs of the Territories.

Such a power is the less to be implied for the reason that it would be free from the restrictions enforced by other clauses of the Constitution on the exercise of the power to regulate commerce granted by article I.

In the case of *Re.* Hennick, above cited, it was held that a power to interfere with commerce between a State and the District of Columbia was not granted to Congress by the clause of the Constitution giving to Congress general legislative power over the District of Columbia.

The reasonable construction of section 3, article IV, of the Constitution is that the power thereby granted is confined to municipal legislation, as distinguished from the power of national legislation given by section 8, article 1, of the Constitution.

The statute of Montana imposed a tax on goods situate in a State and sold to be brought within the Territory of Montana. This, under the decisions in Robbins *v.* Shelby County, and Corson *v.* Maryland (120 U. S., 489), was an attempt to regulate commerce between a State and a Terri-

tory. It was the attempt to exercise an authority not granted by the organic act of the Territory, and was for that reason void.

II.—If the statute of Montana had been authorized by the express language of an act of Congress, such an act of Congress would have been invalid on two grounds:

1. Congress cannot delegate such a power.
Cooley, Principles of Constitutional Law, 98.

2. The power to regulate commerce is to be exercised in conformity with the other provision of the Constitution, that all duties, imposts, and excises shall be uniform throughout the United States. (Section 8, article I.)

A tax levied in the exercise of the power to regulate commerce must be a uniform tax.

Re. Hennick, 5 McA., 489.

If it be assumed that Congress has by statute attempted to levy the tax in question in this case, such tax would be unconstitutional, as not being uniform.

In any view, the authority to levy the tax in question was invalid under the Constitution of the United States. There was, therefore, error in the judgment, and it should be reversed.

JAMES LOWNDES,
For Plaintiff in Error.

IN THE

Supreme Court of the United States.

October Term 1888.

GEORGE W. FARNSWORTH
vs.
THE TERRITORY OF MONTANA. } No. 93.

Brief on the Appellate Jurisdiction of the Supreme Court of the United States over the Decisions of the Supreme Court of the Territory of Montana in Criminal Cases.

This brief is filed in compliance with the order of the Court.

Congress clearly has constitutional power to give such jurisdiction to the Supreme Court, and the only question is whether it has in fact given it.

The following are the statutory provisions regulating the appellate jurisdiction of this court over the judgments and decrees of territorial courts:

"The final judgments and decrees of the Supreme Court of any Territory, except the Territory of Washington, in cases where the value of the matter in dispute, exclusive of costs, to be ascertained by the oath of either party or other competent witnesses, exceeds one thousand dollars, may be reviewed and reversed or affirmed in the Supreme Court, upon writ of error or appeal, in the same manner and under the same regulations as the final judgments and decrees of a Circuit Court. [In the

Territory of Washington the value of the matter in dispute must exceed two thousand dollars, exclusive of costs. And any final judgment or decree of the Supreme Court of said Territory in any cause, (when) the Constitution or a statute or a treaty of the United States is brought in question, may be reviewed in like manner.]" (R. S., Sec. 702.)

The last two clauses of this section apply exclusively to the Territory of Washington.

Snow *v.* U. S., 118, U. S., 346.

"No appeal or writ of error shall hereafter be allowed from any judgment or decree in the Supreme Court of any of the Territories unless the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars. The preceding section shall not apply to any case wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, but in all such cases an appeal or writ of error may be brought without regard to the sum or value in dispute."

23 S. L., 442, (3 March, 1885.)

The larger part of the appellate jurisdiction of this court over the decisions of the territorial courts is derived from the first clause of Revised Statutes, section 702.

There is nothing in the language of this clause to restrict its operation to civil cases. In this respect it differs from the 22d section of the Judiciary Act, and its substitute, Revised Statutes, section 391, giving jurisdiction over the decisions of the Circuit Courts. That jurisdiction is expressly confined to *civil* actions by the terms of those enactments.

In the case of Watts *v.* The Territory of Washington (91 U. S., 580) this court decided that the first clause of Revised Statutes, section 702, did not confer jurisdiction in criminal cases. The grounds of the opinion are not stated.

The eighth section of the act of 1801, giving the court jurisdiction over the decisions of the courts of the District of Columbia is as broad in its language as Revised Statutes, section 702. In United States *v.* More (3 Cr., 159) it was held that the last-mentioned act did not embrace criminal cases. This construction was rested on the ground that the words "value of the matter in dispute" (which were contained in the act of 1801) are appropriate to civil cases.

The first clause of Revised Statutes, section 702, was considered in Smith *v.* Whitney (116 U. S., 167) and was there held to embrace a writ of error to the final judgment of the Supreme Court of the District of Columbia refusing a writ of prohibition to a court-martial.

The latter case establishes the principle that a criminal case is within section 702 if the judgment is attended with pecuniary loss. It seems, in effect, to overrule United States *v.* More.

But the construction of the first clause of Revised Statutes, section 702, is important only as throwing light on the policy of Congress in regard to the appellate jurisdiction over the decisions of the territorial court.

The jurisdiction in the present case is derived from the second clause of the act of 1885. The first clause of the act does not confer jurisdiction, but merely narrows that which had been given by Revised Statutes, section 702.

The second clause of the act, on the other hand, contains an affirmative grant of jurisdiction in addition to that given by Revised Statutes, section 702. It may be paraphrased thus:

"Appeals or writs of error may be brought without regard to the law or value in dispute in cases in which the validity of a treaty or statute of, or authority exercised under, the United States is drawn in question."

Does this enactment embrace criminal cases?

The words of the act are plain, and certainly broad enough to include criminal cases. "In all such cases," &c., is its language.

If the act is to be restricted to civil cases, this must be on some principle of construction by which the natural import of the words is to be narrowed.

The reasoning in More *v.* U. S., 3 Cr., 159, on the construction of the act of the act of 1801, does not apply to the act, because the jurisdiction is given without reference to the value of the matter in dispute. The ground of the restrictive construction given to that act is absent from the act of 1885.

Words substantially the same as those of the act of 1885 have received from this court the construction here contended for.

The act of 1867, amending the twenty-fifth section of the Judiciary Act provides:

"That a final judgment or decree in any suit in the highest court of a State * * * where is drawn in question the validity of a statute, or of an authority exercised under a State, shall," &c.

A writ of error was applied for, under this act, to the judgment of a State court in a criminal case. The court said:

"Neither the act of 1789 nor the act of 1867, which, in some particulars supersedes and replaces the act of 1789, makes any distinction between civil and criminal cases, in respect to the revision of the judgments of State courts by this court; nor are we aware that it has ever been contended that any such distinction exists. Certainly none has been recognized here. No objection, therefore, to the writ of error asked for by the petition can arise from the circumstance that the judgment which we are asked to reverse was rendered in a criminal case."

Twitchell *v.* Pennsylvania, 7 Wall., 321.

The language of the act of 1867 cannot, in effect, be distinguished from that of the act of 1885.

In *ex-parte* Spies, 123 U. S., 131, no question was made of the applicability of the act of 1867 to criminal cases. Nor in Brooks *v.* Missouri, 124 U. S., 394.

The last clause of section 702, Revised Statutes provides that the final judgment or decree of the Supreme Court of the said territory (Washington) in any cause (when) the Constitution or a statute or treaty of the United States is brought in question may be reviewed in like manner (*i. e.*, by the Supreme Court.)

This language is similar to that used in the act of 1885.

In the case of Watts *v.* The Territory of Washington 91 U. S., 580, this court said:

"This court can only review the final judgments of the Supreme Court of the Territory of Washington in *criminal* cases when the Constitution or a statute or treaty of the United States is drawn in question." R. S. Sec. 702.

Appellate jurisdiction without regard to the amount in dispute is given in cases involving constitutional questions in the Circuit Courts (R. S., Sec. 699), in the District of Columbia (23 S. L., 443), in the State courts, and in the Territorial courts. It is fairly to be inferred that Congress intended to restrict the appellate jurisdiction, where only questions of municipal law were involved, to civil cases, and to give appellate jurisdiction to cases, both civil and criminal, whenever the Constitution or the national authority were in question.

It thus appears that this court has, in several instances, construed words similar to those used in the act of 1885 as including criminal cases. It is submitted, therefore, that the terms of the act of 1885 were intended to embrace criminal cases, and that the present case is within the jurisdiction of the court.

JAMES LOWNDES,
Att'y for Farnsworth.

29-114

129-114

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. ~~390.~~ 119

FRANK M. DENT, PLAINTIFF IN ERROR,

vs.

THE STATE OF WEST VIRGINIA.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA.

FILED OCTOBER 13, 1885.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 390.

FRANK M. DENT, PLAINTIFF IN ERROR,

vs.

THE STATE OF WEST VIRGINIA.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, JANUARY 28, 1888.

1 WEST VIRGINIA, *To wit:*

Pleas and proceedings before the supreme court of appeals on the 1st day of November, 1884.

Be it remembered that heretofore, to wit, on the 22d day of May, 1883, Frank M. Dent, by M. H. Dent, Esq., his attorney, presented to Hon. Samuel Woods, one of the judges of this court, in vacation, a petition praying for a writ of error to a judgment of the circuit court of Preston county, rendered on the 12th day of April, 1883, in a case in which the State of West Virginia was plaintiff and the said petitioner was defendant, with a transcript of the record of the judgment aforesaid accompanying the petition, and a certificate of counsel practicing in this court, that in his opinion the judgment complained of ought to be reviewed, annexed thereto; which being seen and inspected by the Hon. Samuel Woods, judge as aforesaid, the writ of error prayed for was allowed.

A printed copy of the petition, record, certificate, and order allowing writ of error aforesaid is hereto attached and made a part of this record.

1½ Supreme Court of Appeals of West Virginia, Wheeling.

THE STATE OF WEST VIRGINIA, Plaintiff Below, Defendant in Error,
against
FRANK M. DENT, Defendant Below, Plaintiff in Error.

From the circuit court of Preston county.

Judges: Hon. Okey Johnson, president; Hon. T. C. Green; Hon. A. C. Snyder; Hon. Sam'l Woods; O. S. Long, clerk.

2 *Petition.*

To the supreme court of appeals of the State of West Virginia:

Your petitioner, Frank M. Dent, says that he is aggrieved by a final judgment of the circuit court of Preston county, rendered on the — day of April, 1883, upon an indictment therein pending against your petitioner for following his profession, the ancient and honorable practice of medicine, and his only means of livelihood. A complete copy of the record of said indictment and proceedings had in relation thereto is herewith presented for your consideration.

As will more fully appear from an inspection of said record, petitioner says that said court erred—

1st. In overruling the motion to quash said indictment.

2d. In overruling the motion in arrest of judgment.

He therefore prays a writ of error to operate as a supersedeas, that said erroneous judgment may be reviewed and reversed; and he will ever pray, &c.

FRANK M. DENT, *Petitioner,*
Per Attorney.

M. H. DENT, *Attorney.*

I, John H. Holt, do certify that I have examined the foregoing petition, and in my opinion it is proper that said judgment should be reviewed by the supreme court of appeals.

JNO. H. HOLT,
Attorney-at-Law.

A writ of error is allowed to the petitioner to the said judgment of the circuit court of Preston county, as prayed for in his said petition.

Given under my hand this 22d day of May, 1883.

SAM'L WOODS,
Judge of the Supreme Court of Appeals of West Virginia.

To O. S. Long, Esq., clerk of Supreme court of appeals of West Va.

3 *Record.*

STATE OF WEST VIRGINIA:

In the Circuit Court of Preston County.

STATE *vs.* FRANK M. DENT.

Misdemeanor.

Be it remembered that at a term of said court held in and for said county on the 28th day of November, 1882, the following-named gentlemen were summoned and sworn as a grand jury for this term, viz., James C. McGrew, who was selected as foreman, and John Hartman, Jesse Spurgin, Herbert Otto, Abner Liston, Charles T. Lawton, Squire B. Daniels, Abraham Reed, Amos Hartley, Moses T. Sinclair, Eugene Lanham, Caleb Piles, Jacob N. Bower, Elijah Messenger, James S. Myers, and Andrew Bolyard, who, having received their charge, were sent to their room, after which they returned into court, but not having completed their business are adjourned until to-morrow morning at 9 o'clock.

At which day, to wit, at a circuit court of said county, held as aforesaid, on the 29th day of November, 1882, the grand jury of this term this day appeared in court pursuant to their adjournment on yesterday, and were again sent to their room; after which they returned into court and presented an indictment *vs.* Frank M. Dent for a misdemeanor—a true bill No. 3—which indictment is in these words:

Indictment.

THE STATE OF WEST VIRGINIA:

In the Circuit Court Thereof, at the November Term, 1882.

The grand jury of the State aforesaid, in and for the body of the county aforesaid, upon their oaths, present that Frank M.
4 Dent, on the — day of June, 1882, in said county, did unlawfully engage in the practice of medicine without a diploma, certificate, and license therefor, as required by law.

And the grand jurors aforesaid, upon their oaths aforesaid, do fur-

ther say that the said Frank M. Dent did so engage in the practice of medicine as aforesaid on the said — day of June, 1882, by then and there professing publicly to be a physician and prescribing for the sick and appending to his name the letters M. D., and the grand jurors aforesaid, upon their oaths aforesaid, do further say that the said Frank M. Dent, on the said — day of June, 1882, was not then and there a physician and surgeon who was then and there called from another State to treat a particular case and to perform a particular surgical operation, and did not otherwise practice in this State, and the grand jurors aforesaid, upon their oaths aforesaid, do further say that the said Frank M. Dent, on the said — day of June, 1882, was not then and there a commissioned officer of the United States Army and Navy and marine hospital service, against the peace and dignity of the State.

NEIL J. FORTNEY,
Prosecuting Attorney.

Found upon the testimony of Arthur Bailey, a witness, sworn in open court, by order of the court, to give evidence before the grand jury.

(Endorsement:) The State *vs.* Frank M. Dent. Indictment for a misdemeanor. A true bill. J. C. McGrew, foreman. Neil J. Fortney, prosecuting attorney.

Whereupon came the parties, by their attorneys, and thereupon the defendant moved the court to quash the indictment herein, of which motion the court takes time to consider.

And at another day of said court held, as aforesaid, on the 11th day of April, 1883, came the parties, by their attorneys, and the defendant's motion to quash, being maturely considered, is overruled, and thereupon the defendant says that he is not guilty in manner and form as herein alleged, and having by his plea put himself upon the country, the State does likewise, and the parties having agreed upon certain facts per writing here filed in these words:

Indictment No. 3.

STATE *vs.* FRANK M. DENT.

Be it remembered that on the trial of this case the State, by the prosecuting attorney, Neil J. Fortney, and the defendant, by his attorney, M. H. Dent, agreed to the following statement of facts, to wit:

That the defendant was engaged in the practice of medicine in the town of Newburg, Preston county, West Virginia, at the time charged in the indictment, and had been so engaged since the year 1876 continuously to the present time, and has during all said time enjoyed a lucrative practice, publicly professing to be a physician, prescribing for the sick, and appending to his name the letters M. D.; that he was not then and there a physician and surgeon called from

another State to treat a particular case or to perform a particular surgical operation, nor was he then and there a commissioned officer of the United States Army and Navy and hospital service; that he has no certificate, as required by section 9, chapter 93, acts of the Legislature of West Virginia, passed March 15, 1882, but has a diploma from the "American Medical Eclectic College of Cincinnati, Ohio;" that he presented said diploma to the members of the board of health, who reside in his congressional district, and asked for the certificate as required by law, but they, after retaining said diploma for some time, returned it to defendant with their refusal to grant him a certificate asked, because, as they claimed, said college did not come under the word reputable as defined by said board of health; that if the defendant had been or should be prevented from practicing medicine it would be a great injury to him, as it would deprive him of his only means of supporting himself and family; that at the time of the passage of the act of 1882 he had not been practicing medicine ten years, but had only been practicing six, as aforesaid, from the year 1876.

And these are all the facts in the case.

NEIL J. FORTNEY,
Prosecuting Attorney.
M. H. DENT,
Attorney for Defendant.

6 And thereupon the defendant asked that the same might be signed, sealed, and made a part of the record in this case, which is accordingly done.

WILLIAM T. ICE. [SEAL.]

Jury.

A jury was thereupon selected and sworn according to law, viz: John Conley, Henry Shaffer, Joseph J. McKinney, Jacob Gibson, William F. Fortney, John Guthrie, William M. Wolf, David M. Wotring, Joseph A. Beatty, David H. Savage, Henry H. Reed, and Eugene McGinnis.

Verdict.

Who, having heard the evidence, say that they find the defendant guilty.

Whereupon, on motion of the defendant, the court forbears to enter judgment herein until to-morrow.

Judgment.

At which day, to wit, at a circuit court of said county held, as aforesaid, on the 12th day of April, 1883, came again the parties, by their attorneys, and thereupon the defendant's motion in arrest of judgment, being argued and considered, is overruled; and the court, having assessed the fine herein at fifty dollars, doth accordingly consider that the State recover of the defendant the said fine and the costs.

MEMORANDUM.—The defendant, having excepted to the opinion of the court given as aforesaid, tendered his bill of exceptions, which was received and signed by the court.

The said bill of exceptions is in these words:

Bill of Exceptions.

STATE *vs.* FRANK M. DENT.

Indictment No. 3.

Be it remembered that on the trial of this case, and after the verdict of the jury, and the court had certified the facts as agreed and proven, in words and figures as follows, to wit:

"That the defendant was engaged in the practice of medicine in the town of Newburg, Preston county, West Virginia, at the time charged in the indictment, and had been so engaged since
7 the year 1876 continuously to the present time, and has during all said time enjoyed a lucrative practice, publicly professing to be a physician, prescribing for the sick, and appending to his name the letters M. D.; that he was not then and there a physician and surgeon called from another State to treat a particular case or to perform a particular surgical operation, nor was he then and there a commissioned officer of the United States Army and Navy and hospital service; that he has no certificate, as required by section 9, chapter 93, acts of the Legislature of West Virginia passed March 15th, 1882, but has a diploma from the 'American Medical Eclectic College of Cincinnati, Ohio;' that he presented said diploma to the members of the board of health, who reside in his congressional district, and asked for the certificate as required by law, but they, after detaining said diploma for some time, returned it to defendant with their refusal to grant him the certificate asked, because, as they claimed, said college did not come under the word reputable as defined by said board of health; that if defendant had been or should be prevented from practicing medicine it would be a great injury to him, as it would deprive him of his only means of supporting himself and family; that at the time of the passage of the said act of 1882 he had not been practicing medicine ten years, but had only been practicing six years, to wit, as aforesaid, from the year 1876; and these are all the facts in the case."

The defendant, upon the facts as aforesaid, moved the court in arrest of judgment that the said act of the Legislature passed March 15th, 1882, styled an act "concerning the public health," was unconstitutional and therefore void so far as it interfered with the vested rights of this defendant in relation to the practice of medicine, which motion having been argued and considered was overruled by the court, and to which opinion of the court overruling said motion the defendant now here excepts and tenders this his bill of exceptions, and asked that the same may be signed, sealed, and made part of the record of this case, which is accordingly done.

[SEAL.] WILLIAM T. ICE,
Judge Presiding.

8 STATE OF WEST VIRGINIA, } ss:
County of Preston, }

I, Smith Crane, clerk of the circuit court of said county, do certify that the foregoing contains a transcript of the record of the cause therein mentioned.

May 1st, 1883.

Teste: SMITH CRANE, *Clerk.*

Clerk's fee for record	$1 70
Postage	27
Total	$1 97

(Record printed July 17, 1883.)

(Printer's fee for petition, record, and cover, $7.65.)

9 The writ of error issued in pursuance of the order aforesaid is, with the several endorsements thereon, in the words and figures following:

The State of West Virginia to the sheriff of Preston county, Greeting:

Whereas, upon the petition of Frank M. Dent, a writ of error has been allowed from our supreme court of appeals to a judgment rendered by the circuit court of Preston county, on the 12th day of April, 1883, in a certain cause then therein pending, in which the State of West Virginia was plaintiff and the said petitioner was defendant, and the same has been docketed in our said supreme court of appeals, we being willing that the error, if any there be, shall be corrected, now, therefore, we command you that from all further proceedings on said judgment you altogether supersede, and that you summon the said State of West Virginia to appear

10 before the judges of our said supreme court of appeals, at Wheeling, on the first Monday in August next, then and there to have a rehearing of the whole matter in said judgment contained, and have then there this writ.

Witness O. S. Long, clerk of our said supreme court of appeals, this 23rd day of May, 1883, and in the 20th year of the State.

O. S. LONG.

No bond is required.

Attest: O. S. LONG, *Clerk.*

Endorsed: Delivered an office copy hereof to Neil J. Fortney, pros. att'y of Preston Co., W. Va., in person. D. J. Gibson, D. S. for E. Thomas, S. P. C. Filed May 31, 1883. Attest: O. S. Long, cl'k.

And on another day, to wit, at a supreme court of appeals held in Wheeling, in Ohio county, on the 17th day of June, 1884, the following order was entered:

STATE OF WEST VIRGINIA, Plaintiff Below, Defendant in Error.

vs.

FRANK M. DENT, Defendant Below, Plaintiff in Error.

11 Upon a writ of error to a judgment of the circuit court of Preston county, rendered on the 12th day of April, 1883, this day came the plaintiff in error, by M. H. Dent, Esq., his attorney, and this case was fully heard upon the transcript of the record of the judgment aforesaid and the arguments of counsel thereon; but, the court not being advised of its judgment to be given, time is taken to consider thereof.

And on another day, to wit, at a supreme court of appeals held in Wheeling, in Ohio county, on the 1st day of November, 1884, the day hereinbefore first mentioned, the following judgment was rendered:

STATE OF WEST VIRGINIA, Plaintiff Below, Defendant in Error,

vs.

FRANK M. DENT, Defendant Below, Plaintiff in Error.

12 Upon a writ of error to a judgment of the circuit court of Preston county, rendered on the 12th day of April, 1883, the court, having maturely considered the transcript of the record of the judgment aforesaid and the arguments of counsel thereon, is of opinion, for reasons stated in writing and filed with the record, that there is no error in said judgment; it is, therefore, considered by the court that the judgment of the circuit court of Preston county, rendered in this case on the 12th day of April, 1883, be, and the same is hereby, affirmed, and that the defendant in error recover against the plaintiff in error thirty dollars damages and its costs about its defense in this court in this behalf expended, which is ordered to be certified to the circuit court of Preston county.

And on another day, to wit, at a supreme court of appeals held in Wheeling, in Ohio county, on the 6th day of December, 1884, the following order was entered:

STATE OF WEST VIRGINIA, Plaintiff Below, Defendant in Error,

vs.

FRANK M. DENT, Defendant Below, Plaintiff in Error.

13 Upon a writ of error to a judgment of the circuit court of Preston county rendered on the 12th day of April, 1883.

This day came again the plaintiff in error, by M. H. Dent, Esq., his attorney, and filed a written statement of his desire to present a petition to the Supreme Court of the United States for a writ of error to the judgment rendered by this court in this case on a former day of this term, which, being seen and inspected by the court, it is ordered that the execution of said judgment be, and the same is hereby, suspended for the term of ninety days from and after the end of the present term of this court, but such suspension shall not take effect until the plaintiff in error or some other person shall

have given, before the clerk of the circuit court of Preston county, or before the clerk of this court, bond, with good personal security, in the penalty of one hundred and fifty dollars, conditioned according to law.

14 I, O. S. Long, clerk of the supreme court of appeals of West Virginia, hereby certify that the foregoing is a true and complete copy of the record of proceedings had in the case of the State of West Virginia *vs.* F. M. Dent, lately depending in this court, only omitting therefrom a copy of the written opinion of the court filed in my office on the 1st day of November, 1884.

In testimony whereof I have hereunto set my hand and affixed the seal of our said supreme court of appeals this 13th day of February, 1885, and in the 22d year of the State.

[Seal Supreme Court of Appeals, West Virginia.]

O. S. LONG.

15 To the Honorable Stephen J. Field, justice of the Supreme Court of the United States:

And now comes Frank M. Dent, a citizen of the United States, resident at the town of Newburg, county of Preston and State of West Virginia, and complains that in the records and proceedings, and also in the rendition of a judgment in a suit between the State of West Virginia, plaintiff, and said Frank M. Dent, defendant, in the supreme court of appeals of said State, being the highest court of law or equity of said State in which a decision could be had in said suit *and in which a decision could be had in said suit*, and in which a final judgment was rendered on the 1st day of November, 1884, in said suit, wherein was drawn in question the validity of a statute of said State on the ground of its being repugnant to the Constitution of the United States, in that, among other things, it deprived the said Frank M. Dent of his property without due process of law, and the decision was in favor of its validity, all which appears in the record of said suit, manifest error hath happened, to the great damage of the said Frank M. Dent.

Wherefore he prays for the allowance of a writ of error and such other process as may cause the same to be corrected by the Supreme Court of the United States.

FRANK M. DENT.

Allowed:

——— ———.

16 [Endorsed:] Petition. Frank M. Dent *vs.* The State of West Virginia.

17 Supreme Court of the United States.

FRANK M. DENT, Plaintiff in Error,

vs.

STATE OF WEST VIRGINIA, Defendant in Error.

Know all men by these presents that we, Frank M. Dent and William M. Dent, are held and firmly bound to the State of West Vir-

ginia in the sum of three hundred dollars, to be paid to the said State of West Virginia; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, administrators, firmly by these presents.

Sealed with our seals and dated this 2d day of March, 1885.

Whereas the above-named Frank M. Dent hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the supreme court of appeals of the State of West Virginia:

Now, therefore, the condition of this obligation is such that if the above-named Frank M. Dent shall prosecute his said writ of error to effect and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

FRANK M. DENT. [SEAL.]
WM. M. DENT. [SEAL.]

Sealed and delivered in presence of—
G. THOS. PLUMMER.

18 UNITED STATES OF AMERICA, }
District of Columbia, } *ss:*

William M. Dent, being duly sworn, says that he is worth the sum of six hundred dollars above all his just debts and liabilities.

——— ———.

Sworn to before me this 2d day of March, 1885.

{ Seal of Charles S. Bundy, United States Commissioner for the District of Columbia. }

CHARLES S. BUNDY,
U. S. Commissioner.

I approve the above bond and the sufficiency of the sureties thereto.

M. R. WAITE,
Chief Justice U. S.

19 [Endorsed:] Frank M. Dent *vs.* The State of West Virginia. Bond.

20 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the supreme court of appeals of the State of West Virginia, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said supreme court of appeals, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit, between Frank M. Dent, plaintiff in error, and The State of West Virginia, de-

fendant in error, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or
21 statute of or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said plaintiff in error, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the fifth day of March, in the year of our Lord one thousand eight hundred and eighty-five.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed, not to operate as a supersedeas.

M. R. WAITE,
Chief Justice U. S.

22 I, M. H. Dent, do solemnly swear that on the 18th day of April, 1885, I executed the within writ by delivering a copy thereof to O. S. Long, clerk of the supreme court of the State of West Virginia, at the court-room, in the presence of the court, then in session, and by the direction of the judges thereof.

M. H. DENT.

Sworn to & subscribed before the undersigned, John W. Mason, a commissioner of the district court of the United States in and for the district of West Virginia, this twenty-ninth day of September, 1885.

JOHN W. MASON,
U. S. Com'r.

23 The United States of America to the State of West Virginia, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of appeals of the State of West Virginia, wherein Frank M. Dent is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this fifth day of March, in the year of our Lord one thousand eight hundred and eighty-five.

M. R. WAITE,
Chief Justice U. S.

24 On this 29th day of September, in the year of our Lord one thousand eight hundred and eighty-five, personally appeared Marmaduke H. Dent before me, the subscriber, John W. Mason, a commissioner of the district court of the United States in & for the district of West Virginia, and made oath that he delivered a true copy of the within citation to E. Willis Wilson, Governor of the State of West Virginia, and Alfred Caldwell, attorney general for said State, at the state-house, on the 18th day of April, 1885.

M. H. DENT.

Sworn to and subscribed the twenty-ninth day of September, A. D. 1885.

JOHN W. MASON,
U. S. Com'r for Dist. of W. Va.

25 *Reports of the Decisions of the Supreme Court of Appeals of West Virginia.*

Fall Special Term, Wheeling.*

STATE OF WEST VIRGINIA *v.* DENT.

Submitted June 17, 1884. Decided Nov. 1, 1884.

Sections 9 and 15 of chapter 93 of the acts of 1882, passed March 15, 1882, entitled "An act amending and re-enacting chapter 150 of the Code of West Virginia concerning the public health," is constitutional and valid.

Green, judge, furnishes the following statement of the case:

At the November term, 1882, the grand jury of Preston county found an indictment in the circuit court of Preston against
26 Frank M. Dent for practicing medicine in this State without having complied with the provisions of section 9 of chapter

* The other decisions announced at this term are published in Vol. 24.

93 of the acts of 1882, in violation of section 15 of said act. The defendant moved to quash this indictment. The motion, as is stated in the brief of the counsel for the plaintiff in error, was based solely on the ground that these sections 9 and 15 of chapter 93 of the acts of 1882 were unconstitutional. The court decided that they were constitutional and overruled the motion, and the defendant then pleaded not guilty.

On the trial of the case it was proven that the defendant was engaged in the practice of medicine in the town of Newburg, Preston county, West Virginia, at the time charged in the indictment, and had been so engaged since the year 1876, continuously, to the present time, and had during all said time enjoyed a lucrative practice, publicly professing to be a physician, prescribing for the sick, and appending to his name the letters M. D.; that he was not then and there a physician and surgeon called from another State to treat a particular case or to perform a particular surgical operation, nor was he then and there a commissioned officer of the United States Army and Navy and hospital service; that he has no certificate as required by section 9, chapter 93, acts of the Legislature of West Virginia, passed March 15, 1882, but has a diploma from the "American Medical Eclectic College of Cincinnati, Ohio;" that he presented said diploma to the members of the board of health, who reside in his Congressional district, and asked for the certificate as required by law, but they, after retaining said diploma for some time, returned it to defendant with their refusal to grant him the certificate asked, because, as they claimed, said college did not come under the word reputable as defined by said board of health; that if the defendant had been or should be prevented from practicing medicine it would be a great injury to him, as it would deprive him of his only means of supporting himself and family; that at the time of the passage of the acts of 1882 he had not been practicing medicine ten years, but had only been practicing six, as aforesaid, from the year 1876.

These being all the facts proven the jury found the defend-
27 ant guilty, and thereupon the defendant moved to arrest the judgment, which motion the court overruled and assessed the fine of $50.00, and rendered judgment on April 12th, 1882, in favor of the State against the defendant for this fine and costs. To the refusal of the court to arrest this judgment upon the above facts, certified to be all the facts proven, the defendant took a bill of exceptions, which on its face states that this motion was based on the ground that "said act of the Legislature, passed March 15th, 1882, styled an act 'concerning public health,' was unconstitutional and therefore void so far as it interfered with the vested rights of this defendant in relation to the practice of medicine."

To this judgment of the circuit court a writ of error was allowed by a judge of this court.

M. H. DENT,
For Plaintiff in Error.

GREEN, *Judge:*

The only question involved in this case is, Are sections 9 and

15 of chapter 93 of the acts of 1882 constitutional? I have not examined critically the indictment to determine whether in form or in substance it was fatally defective, because the counsel for the plaintiff in error in his brief expressly waives, as he states he did in the circuit court, all objections to such defects in form or substance in the indictment, if any such exist, and bases his claim to have the judgment of the circuit court reviewed solely on the ground that the indictment was based on an unconstitutional and void act of the Legislature, and should for that reason have been quashed. Sections 9 and 15 of chapter 93 of the acts of 1882, claimed thus to be unconstitutional, are in these words:

"9. The following persons and no others shall hereafter be permitted to practice medicine in this State, viz:

"First. All persons who are graduates of a reputable medical college in the schools of medicine to which the person desiring to practice belongs. Every such person shall, if he has not already done so and obtained the certificate hereinafter mentioned, present his diploma to the State board of health, or to the two members thereof in his congressional district, and if the same is found to be genuine and was issued by such medical college as is herein-
28 after mentioned, and the person presenting the same be the graduate named therein, the said board or said two members thereof (as the case may be) shall issue and deliver to him a certificate to that effect, and such diploma and certificate shall entitle the person named in such diploma to practice medicine in all its departments in this State.

"Second. All persons who have practiced medicine in this State continuously for the period of ten years prior to the eighth day of March, one thousand eight hundred and eighty-one. Every such person shall make and file with the two members of the State board of health in the congressional district in which he resides, or if he resides out of the State in the district nearest his residence, an affidavit of the number of years he has continuously practiced in this State, and if the number of years therein stated be ten or more, the said board or said two members thereof shall, unless they ascertain such affidavit to be false, give him a certificate to that fact and authorizing him to practice medicine in all its departments in this State.

"Third. A person who is not such graduate and who has not so practiced in this State for a period of ten years, desiring to practice medicine in this State, shall, if he has not already done so, present himself for examination before the State board of health or before the said two members thereof in the congressional district in which he resides, or, if he resides out of the State, to the said two members of the State board of health in the congressional district nearest his place of residence, who, together with a member of the local board of health who is a physician (if there is such member of the local board) of the county in which the examinatien is held, shall examine him as herein provided, and if, upon full examination, they find him qualified to practice medicine in all its departments, they, or a majority of them, shall grant him a certificate to that effect, and thereafter he shall have the right to practice medicine in this State

to the same extent as if he had the diploma and certificate hereinbefore mentioned. The members of the State board of health in each congressional district shall, by publication in some newspaper printed in the county in which their meeting is to be held, or, if no such paper is printed therein, in some newspaper of general circulation in such district, give at least twenty-one days' notice of the time and place at which they will meet for the examination of applicants for permission to practice medicine, which notice shall be published at least once in each week for three successive weeks before the day of such meeting; but this section shall not apply to a physician or surgeon who is called from another State to treat a particular case or to perform a particular surgical operation in this State and who does not otherwise practice in this State.

"15. If any person shall practice, or attempt to practice, medicine, surgery, or obstetrics in this State, without having complied with the provisions of section 9 of this chapter, except as therein provided, he shall be guilty of a misdemeanor and fined for every such offense not less than fifty nor more than five hundred dollars, or imprisoned in the county jail not less than one month nor more than twelve months, or to be punished by both such fine and imprisonment, at the discretion of the court. And if any person shall file, or attempt to file, as his own, the diploma or certificate of another, or shall file, or attempt to file, a false or forged affidavit of his identity, or shall wilfully swear falsely to any question which may be propounded to him on his examination, as herein provided for, or to any affidavit herein required to be made or filed by him, he shall, upon conviction thereof, be confined in the penitentiary not less than one nor more than three years, or imprisoned in the county jail not less than six nor more than twelve months and fined not less than one hundred nor more than five hundred dollars, at the discretion of the court."

These sections, the counsel for the plaintiff in error insists, are unconstitutional, null, and void. In an elaborate argument he claims that they are inconsistent with article X and with section 1 of article XIV of the amendments to the Constitution of the United States; and that they are also inconsistent with sections 1, 2, 4, 10, and 11 of our bill of rights, article III to our Constitution (acts of 1872–'3, p. 5). He claims that the various provisions contained in the Constitution of the United States and our constitution were intended to incorporate as fundamental principles in our Government certain general views of the objects, ends, and purposes of all governments laid down by certain text-writers, the correctness of which I do not question. I will here quote a number of these general views, selecting those upon which the counsel of the plaintiff must place his principal reliance.

"Every wanton and causeless restraint of the subject, whether practiced by a monarch, a nobility, or a popular assembly, is a degree of tyranny—nay, even laws themselves, whether made with or without our consent, if they regulate and constrain our conduct in mat-

ters of mere indifference without a good end in view, are regulations destructive of liberty."

"That constitution or form of government, that system of laws, is alone calculated to maintain civil liberty which leaves the subject entire master of his own conduct, except on those points where the public good requires some direction or restraint."

"Wherever laws attempt to secure alike to every man, weak or strong, rich or poor, ignorant or instructed, the right, the moral power, of seeking his own happiness in his own way, they invade natural liberty, of which they ought to be the bulwark."

These and certain other general propositions laid down by certain text-writers are regarded by the counsel of the plaintiff in error as fundamental principles of our law and constitution and fairly deducible from the provisions of the Constitution of the United States and of our bill of rights. And he maintains that consistently with them no government can interfere with the right of a citizen to pursue his lawful trade, calling, or profession, or by its Legislature fix the qualifications necessary to be possessed by any person before he may engage in any business, calling, or profession, or confer on any board or other organized body the right to determine whether any person has the requisite qualifications, mental or moral, to engage in any business, calling, or profession, and that if our Legislature has done so it has violated these fundamental principles of good government deducible from those provisions of our Constitution, and that such laws of the Legislature should be pronounced by the courts null and void. The counsel for the plaintiff in error in an elaborate argument has also attempted to show
31 that sections 9 and 15 of chapter 93 of acts of 1882 are most unjust and oppressive, and that they unnecessarily and injuriously interfere with the natural rights of every citizen to engage in the practice of medicine; that they thus interfere with the rights of the citizen by granting to a board the arbitrary right to pass upon his qualifications to practice medicine, and by providing that, unless his qualifications to practice medicine have been shown in the manner arbitrarily prescribed in section 9, if he should practice medicine, as he has a natural right to do, he should be liable to be punished as if he had committed a criminal offense.

Before considering these positions of counsel in any detail it will be well to consider some general views which have been taken by many courts and judges bearing on the general subject. The conclusions reached by Judge Cooley, after reviewing or referring to many authorities, are as follows:

"The rule of law upon this subject appears to be that, except where the Constitution has imposed limits upon the legislative power, it must be considered as practically absolute, whether it operates according to natural justice or not in any particular case. The courts are not the guardians of the rights of the people of the State, except as those rights are governed by some constitutional provision which comes within the judicial cognizance. The protection against unwise or oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the peo-

ple. If this fail, the people in their sovereign capacity can correct the evil, but courts cannot assume their rights. The judiciary can only arrest the execution of a statute when it conflicts with the Constitution; it cannot run a race of opinions upon points of right, reason, and expediency with the law-making power. Any legislative act which does not encroach upon the powers apportioned to other departments of the Government, being *prima facie* valid, must be enforced unless restrictions upon the legislative authority can be pointed out in the Constitution and the case shown to come within them. If courts are not at liberty to declare statutes void because of their apparent injustice or impolicy, neither can they do so because they appear to the minds of the judges to violate funda-
32 mental principles of republican government, unless it shall be found that those principles are placed beyond legislative encroachment by the Constitution. The principles of republican government are not a set of inflexible rules, vital and active in the Constitution, though unexpressed, but they are subject to variation and modification from motives of policy and public necessity, and it is only in those particulars in which experience has demonstrated that any departure from the settled practice works injustice or confusion that we shall discover an incorporation of them in the Constitution in such form as to make them definite rules of action under all circumstances."—Cooley on Con. Lim., 168.

These views of Judge Cooley are certainly entitled to the gravest consideration. He admits, however, on page 164 of the same work, that in certain extreme cases judges of great eminence have been understood to intimate, if not decide, doctrines different from those he asserts. While these views of Judge Cooley must be regarded as laying down correct principles, which should generally guide courts in deciding on the constitutionality of any statute, yet it may be that in certain extreme cases they ought to be departed from, but whether they are or are not of universal application I need not consider in this case, as it is no such extreme case; and the constitutionality of these sections 9 and 15 of chapter 93 of the acts of 1882 is readily shown by the application to them of undisputed principles, well settled by numerous decisions.

The several States of this Union possess a general police power, by which persons and property are subjected to all kinds of restraint and burdens in order to secure the general comfort, health, and prosperity of the State; and the Legislatures of the several States have the perfect right to pass laws to effect these objects, and to adopt whatever necessary measures they may deem proper to secure the comfort, health, and prosperity of the State, or of its citizens, by requiring every citizen to observe the maxim *sic utere tuo ut alienum non lædas.* These principles are laid down in the opinion of Justice Strong in Railroad Company *v.* Husens, 5 Otto, 469, and they were cited and approved by this court in State of West Virginia *v.* Baltimore and Ohio Railroad Co., 24 W. Va., 783.

33 There can be no doubt that the Legislature of this and every other State should permit the utmost freedom of action by each citizen that may consist with the public welfare, and it

ought not by law to impose any restraint which the paramount claims of the community do not demand; but, of course, it does not follow that the Legislature cannot legitimately restrain the action or conduct of any individual or citizen by a general law applicable alike to all, when such restraint is imposed for the purpose of promoting the comfort, health, or prosperity of the community at large. Under these circumstances the Legislature of any of the States has a perfect right under its general police power to pass laws placing individuals under restraint in the exercise of any business, calling, or profession. This power has been constantly exercised by State Legislatures, and the courts have, so far as I know, universally recognized such power and have held that acts of the State Legislature passed in the exercise of this power were constitutional and valid.

In a great variety of cases State Legislatures have required licenses to be granted before a citizen could engage in certain kinds of business or in certain professions, when from the character of the business or profession the public was liable to be imposed upon, unless the individual citizen was placed under this and other restraints imposed on all who engage in such business or profession. Thus laws have been passed to license bakers and to regulate both the weight and price of bread and to prohibit the baking of bread for sale by those not licensed, and such acts of the Legislature have been held valid and constitutional. (The Mayor and Aldermen of Mobile *v.* Quille, 3 Ala., 137.) In no State in this Union, so far as I know, is a citizen permitted to engage in the business of selling intoxicating liquors without being placed under restraint by legislative acts. These restraints vary much in different States; and in very many of them the person desiring to engage in such business has first to obtain a license from a specified body or person, and before obtaining such license has to establish his fitness to engage in such business by proving his moral character. The general right of the Legislature by statutes to regulate the sale of
34 intoxicating liquors and to place persons engaged in this business under whatever restraints the Legislature deems necessary to protect the community from injury, either to its morals or health, is universally recognized by the courts, and is so well understood that no decisions need be referred to as recognizing the validity of this species of legislation. Other sorts of business have been put under restraint and regulation, the general rule being that the Legislature may restrain any one in the exercise of his natural rights to engage in any business whenever the promotion of the public safety, health, or prosperity requires such a restraint.

The principle involved in this regulation by law of various sorts of business has been extended to various callings and professions. Thus, so far as I know, the practice of law is a profession which the Legislature of every State has deemed one which should be regulated by law, and those engaged in this profession are under restraint for the protection of the general public. The person proposing to practice law is everywhere required to obtain a license from some person or persons qualified to determine whether the

applicant has the qualifications necessary to practice law. The constitutionality of such laws, or even their propriety, has never been questioned. The Legislatures have, however, frequently gone further and imposed a tax on persons practicing law as lawyers; and, although this right of the Legislature to impose such a burden on members of this profession while no such burden has been imposed on others has been disputed, yet that right has generally been upheld by the courts. (State *v.* Gazley, 5 Ohio, 21; Cousins *v.* The State, 50 Ala., 113; McCaskell *v.* The State, 53 Ala., 510; Simmons *v.* The State, 12 Mo., 268; Lanquille *v.* The State, 4 Texas, 312; State *v.* Hayne, 4 S. C., 403; State of Louisiana *v.* Frank King, 21 La. Ann., 201.)

These cases, as a matter of course, recognize the authority of the Legislature to require every one engaging in the practice of law to obtain a license. They may also be usefully consulted in determining what should be inserted in any indictment against any person for practicing a profession, whether legal or medical, without a compliance with the statute law placing restraints on the practice of such profession and subjecting to indictment parties engaging in such profession in violation of the statute.

The following additional cases may be referred to as showing not only that the right of the Legislature is universally recognized to restrain persons in their business or profession when the public security or prosperity would be promoted by such restraints, but also as showing what should be alleged in indictments for violations of statutes imposing such restraints: Goldthwaite *v.* Montgomery, 50 Ala., 486; Cohen *v.* Wright, 22 Col., 322; Yale *ex parte*, 24 Cal., 241; Spencer *ex parte*, 10 Nev., 323; Porter & Co. *v.* State, 58 Ala., 66; Antle *v.* State, 6 Tex. App., 202; State *v.* Goldman, 44 Tex., 104; Wheat *v.* State, 6 Mo., 455; Schmidt *v.* State, 14 Mo., 137; State *v.* Hale, 15 Mo., 607; State *v.* Richeson *et al.*, 45 Mo., 575; Ford *v.* Simmons, 13 La. Am., 397; Sheldon *v.* Clark, 1 Johns., 513; Zimmerman *v.* Morrison, 14 Johns., 369; Thuson *v.* Johnson, 9 Bosw. (N. Y.), 154; Great Western R. R. Co. *v.* Bacon, 30 Ill., 347; Gunnur & Son *v.* Sterling, 93 Ill., 569.

These statutes requiring that every person who undertakes to practice law must first be examined by judges competent to determine whether he had the requisite qualifications are based upon the well-known fact that none but those who have been specially educated with reference to practicing law can do so without great injury to the community who must employ lawyers in their business, and who are necessarily incompetent to a considerable extent to judge of the qualifications of a lawyer, and are thus subject to be imposed upon by pretenders ignorant of their profession. To furnish the community some protection against such imposters the statute law in perhaps every State in the Union prohibits any one from practicing law till he has first been examined by a competent judge or by a competent body of men and a certificate of his qualifications and a permission to practice law has been obtained.

The same reasons would seem to require that no one should be

allowed to practice medicine who has not been first examined by some competent person or body of men as to his qualification to practice medicine and has not obtained permission to do so, for it is
obvious that the doctor equally with the lawyer requires a
36 special education to qualify him to practice his profession,
and that the community is no more competent to judge of the qualifications of a doctor than of a lawyer, and is liable to be imposed upon by imposters and quacks professing to practice medicine. Indeed, the liability of the community to be imposed upon by quack doctors would, it seems to me, be even greater than their liability to be imposed upon by pretenders in the profession of the law; yet the Legislatures of many States have singularly neglected to protect the community against imposition by quack doctors, and have left the community to only such protection against them as was furnished by the common law, and even by it physicians undertaking to practice their profession were held responsible not only for due care and diligence, but also for that degree of skill and capacity which ordinarily belongs to those who practice medicine. (See Seare *v.* Prentice, 8 East., 348); but many of our State Legislatures have by statute law afforded additional protection against the humbuggery of quack doctors. Thus at a very early day New York passed statute laws intended to afford such protection.

The supreme court of New York as early as 1806 affirmed a judgment against a physician, inflicting a fine on him of $25 for practicing medicine contrary to the provisions of an act of the Legislature. (Sheldon *v.* Clark, 1 Johns., 513.) There was no question raised in this case as to the constitutional right of the Legislature to pass such an act. By the terms of this act any person was forbidden to practice physic or surgery without a diploma, and if he did so he could not collect his fees as a physician and was subject to be fined $25 for practicing without a license, with certain provisions to be found in Zimmerman *v.* Morrison, 14 Johns., 369. The constitutionality of these and like laws *have* never been questioned in New York. (See Thompson *v.* Staats, 15 Wend., 395.)

In 1817 the Legislature of Massachusetts passed an act whereby it was provided that no person shall recover his fees for medical services who shall commence practice after July 15, 1818, without a degree or license. The validity of this and like acts of the Legislature were never questioned in Massachusetts for many years. (Spaulding *v.* The Inhabitants of Alford, 1 Pick., 33.) But an amend-
37 ment to this statute, made in 1818, whereby it was provided
that no person practicing physic or surgery shall be entitled to the benefit of law for the recovery of any debt or fee for his professional services unless he shall previously to rendering such services have been licensed by the medical society or been graduated a doctor in medicine at Harvard University. This amendment, it was claimed, was unconstitutional, not because it required a license of a physician before he could practice, but because in violation of the Constitution it conferred particular privileges on the medical society and on Harvard University; but the court, in Hewitt *v.* Charir (16 Pick., 356), decided that this act was constitutional.

They say (page 356), "It seems to us that the leading and sole purpose of this act was to guard the public against ignorance, negligence, and carelessness in the members of one of the most useful professions," and this they treated as legitimate, as a matter of course. See also Wright *v.* Lanchton, 19 Pick., 288.

In Maine the Legislature has passed the following act (see R. S. 1871, Ch. 13, § 3): "No person except a physician or surgeon who commenced prior to Feb. 16, 1831, or has received a medical degree at a public institution in the United States or a license from the Maine Medical Association, shall recover any compensation for medical or surgical services unless previous to such services he had obtained a certificate of good moral character from municipal officers of the town where he then resided." In Bibber *v.* Simpson, 59 Me., 181, it was decided that professional services of a medical clairvoyant were "medical services" within the meaning of this act and could not be recovered for if the clairvoyant had not complied with the act. There was no question or suggestion as to the constitutionality of this act.

The Legislature of Texas on August 21, 1876, passed an act to regulate the practice of medicine, which provided, among other things, that no one should practice medicine without having a certificate from some authorized board of medical advisers, as provided by this act, and subjecting any one who did to be fined. In Antle *v.* The State, 6 Tex., 202, the court affirmed a judgment inflicting a fine of $50 on a doctor who had violated this law. The prin-
38 cipal question discussed was whether the information was properly drawn. The constitutionality of the act was not questioned. The provisions of this act may be found in State *v.* Goldman, 44 Tex., 104, where its constitutionality was again assumed to be indisputable.

On May 5, 1868, the Legislature of Ohio passed "An act to protect the citizens of Ohio from empiricism and elevate the standing of the medical profession." It provided, among other things, that it should be unlawful for any person who had not attended two full courses of instruction and graduated at some school of medicine, either of the United States or some foreign country, or who could not produce a certificate of qualification from some State or county medical society, and is not a person of good moral character, to practice medicine in any of its departments for compensation. This act was assumed, as a matter of course, to be valid in Wert *v.* Clutter, 37 Ohio, 347.

There is a statute of the same general character in Missouri, the particular provisions of which I do not know. Under it a physician was convicted for practicing medicine (State *v.* Hale, 15 Mo., 407). The court assumes that the statute is constitutional.

The Legislature of Minnesota in 1883 (Ch. 125 of acts of 1883) passed an act which, among other things, created a board of medical examiners, and required all persons except such as had been practicing medicine for five years within the State, as a condition of their right to practice, to obtain from this board, after examination, its certificate of their qualification, unless the person was a

graduate of a school or medical college and had a diploma which had been presented to this board. This portion of this act was held to be clearly constitutional by the supreme court of Minnesota in the case of Minnesota *v.* The State Medical Examining Board, 32 Minn.

In the acts of Nevada (statute of 1875, 467) is "An act to prevent the practice of medicine by unqualified persons." In Spiney *ex parte*, 10 Nev., 328, it was claimed that this statute was unconstitutional, because " it was a special law in a case where a general law was applicable, contrary to their constitution, and because it
39 was in conflict with the 14th amendment of the Constitution of the United States, which declares " that no State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States," and also with the second section of article IV of the Constitution of the United States, which declares that " the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." The act to which these objections were urged prohibited all persons from practicing medicine or surgery in the State who had not received a medical education and a diploma from some regularly chartered medical school, and imposed a penalty of fine and imprisonment for every violation of these provisions. These provisions were held to be constitutional by the court, and in fact their constitutionality was not even disputed by counsel in argument. But there was a provision in this act that " no portion of this act should apply to those who have practiced medicine or surgery in the State for a period of ten years next preceding the passage of this act." This provision of the act, it was deemed by counsel, " was not founded upon any natural, fair, or reasonable distinction, and makes the law special within the meaning of the prohibition of their constitution against special laws where general laws can be made applicable, and made it a discriminating law, within the prohibition of the Federal Constitution, which declares that no State shall deny to any person within its jurisdiction the equal protection of the laws." See article 14 of amendments of the Constitution, section 10.

Three distinct grounds were taken by counsel to sustain their positions:

1. In admitting those who had practiced ten years and excluding those who had practiced nine years and eleven months.

2. In admitting those who had practiced the requisite period in the State and excluding those who had practiced during the same period in other States.

3. In making a distinction between those who have practiced in the State during ten years next preceding the passage of the act and those who had practiced just as long or longer in this State, but not continuously during the last ten years.

These provisions, it was insisted, were arbitrary and unconstitutional. The first ground of objection was overruled by the
40 court, because, according to the view of Judge Beatty, " It was clearly within the province of the Legislature to declare what is the minimum amount of experience that shall authorize a

license to practice." The second ground was also overruled by the court, because, according to the views of Judge Beatty, the mere practitioner for ten years in Louisiana and Florida might acquire sufficient knowledge to practice in the diseases incident to the climate in these States and yet be unfit safely to practice in the diseases incident to the climate of Nevada. On the third ground there was some diversity of opinion. Only two judges sat in this case—Chief Justice Hawley and Beatty, judge. Judge Beatty was of the opinion that this third ground of objection did not render the law contrary to the provisions of the Nevada constitution forbidding special legislation, though the act was entirely without reason and arbitrary so far as it required ten years' practice in the State preceding the passage of this act." To his mind no reason could be assigned why ten years' practice in the State should not qualify one to practice medicine just as well when a portion of the ten years succeed the passage of the act as when the whole ten years preceded the passage of the act. Nevertheless, he could not hold that the fact that this provision of the law was thus arbitrary and unjust rendered it contrary to the constitution of Nevada prohibiting special legislation: but he did regard this provision as contrary to the 14th amendment of the Constitution of the United States, which forbids any State "to deny to any person within its jurisdiction the equal protection of the laws."

Upon this subject Judge Beatty says (page 334): "I entertain no doubt that among the inherent privileges of the citizens of a free country is the right to pursue a lawful calling in a lawful manner—that is, subject to such restrictions, and none others, as may be deemed necessary for the public welfare. What restrictions are necessary in that view it is the province of the Legislature to decide, and its decision, no matter how ill-advised it may appear to be, is binding on the courts whenever it appears to have been based upon motives of policy or of general expediency; but when the law excludes a class of citizens from the pursuit of a useful, hon-
41 orable and profitable avocation, and there is no assignable motive of policy or expediency to justify the exclusion; or, in other words, when it is apparent that the whole scope and object of the law is to make a forbidden discrimination without looking to the attainment of any public benefit I think a court should not hesitate to say such a law is forbidden by the 14th amendment of the Federal Constitution. I think there is no sort of reason for requiring the practice to have extended over the particular ten years immediately preceding the enactment of the law, and to this extent I am prepared to hold it unconstitutional."

Chief Justice Hawley, on the contrary, was of the opinion that the law was in all respects constitutional. He says (page 355): "The right of the Legislature to prescribe qualifications, based upon professional skill or knowledge, so as to prevent unqualified persons from practicing any profession, has been time and again recognized in the various courts of the several States and in the Supreme Court of the United States. The recognition of this power necessarily implies that the Legislature is the sole judge of the qualifications, and

that the establishment of any rule would, to some extent, be arbitrary and an imposition of some restraint upon its individual exercise." He declined to consider whether the law was in any respect unreasonable and unjust, and says, on page 337: "In adopting the exception to the requirement that the person should have a diploma, that this should not be required of those who have practised medicine or surgery in the State for a period of ten years next preceding the passage of the act, the Legislature did not infringe upon any provision of our State or Federal Constitution, and we are not, therefore, required to state what in our opinion may have been the motive for the enactment of this law. The reasons which may have induced the Legislature to insert the exception may have been as varied as the different minds of its members. It is simply the question of power which we are called upon to discuss and determine. Whether the power was reasonably or unreasonably exercised, whether it was wise or unwise, expedient or inexpedient, to enact the law, are questions left exclusively to other departments of our State government to decide, and their judgment must necessarily be decisive on these questions."

42 In the case of Wert *v.* Clutter, 37 Ohio St., 347, the question in controversy was, whether the Ohio statute, by its exception in favor of persons who had practiced medicine for ten years, was to be construed as meaning ten years prior to the passage of the act, or whether, under the wording, the statute only required ten years of continuous practice, embracing the time since, as well as before, the passage of the act. This last construction was the one adopted by the majority of the court (three out of five judges), while two of the judges interpreted the act to mean that the ten years of continuous practice must precede the passage of the act in order to entitle one to practice medicine by virtue only of his being a practitioner; but none of the judges who constituted the majority or minority of the court intimated that, in their opinion, the interpretation of the act which would require the ten years' continuous practice to precede the passage of the act would make it unconstitutional or a violation of that portion of the 14th amendment of the Constitution of the United States which forbids any State to deny to any person within its jurisdiction the equal protection of the laws. The notion that it would do so seems to have been a view peculiar to Judge Beatty of Nevada, and it seems to me that his reasoning is unsound, and if adopted by the courts would lead to much mischief. The reasoning of Chief Justice Hawley in that case seems to me much more sound, and was doubtless the ground on which all of the judges in Wert *v.* Clutter, 37 Ohio St., 347, acted when they tacitly assume that, under any construction of the Ohio act, it would not violate the Constitution of the United States.

It seems, therefore, clear that both on reason and authority we cannot do otherwise than hold that all the provisions in sections 9 and 15 of chapter 93 of the acts of 1882 are constitutional and valid and should be approved by the courts. There is not a single provision in either of these sections of this chapter that violates any provision of the Constitution of the United States or of the constitu-

tion of this State. Acts very similar to the provisions contained in these sections have, as we have seen, been held to be valid by the courts in many of the States, and though their State constitutions have in them provisions entirely similar to most of the pro-
43 visions of our State constitution which, it is insisted, are violated by these sections, yet in a great majority of the cases which we have cited their courts have assumed them to be valid and have not deemed it necessary to show that they were not inconsistent with any provisions of their State constitutions. These decisions, as a matter of course, necessarily held that laws of the character of those under consideration did not violate any provision of the Constitution of the United States which was in full force in all these States.

It would seem, therefore, useless to show how the provisions of sections 9 and 15 consist with all the provisions of the Constitution of the United States. It is only necessary to read the provisions in the Constitution of the United States which counsel claims conflict with these sections of our law to see that, in accordance with the well-established modes of construing constitutional provisions as shown in the decisions referred to, they cannot be construed as in conflict with the sections of our law under consideration. But as there are some provisions of the bill of rights which are not found in the constitution of other States I will refer to the one of those provisions of our constitution supposed to be in conflict with the provisions in these sections and show that there is no such conflict.

Article VI, section 1, of our constitution, acts of 1872–3, p. 11, provides: "The legislative power shall be vested in a senate and house of delegates." This obviously confers on them all legislative power except such as they are prohibited by the constitution in its other provisions from exercising. That sections 9 and 15 of chapter 93 of acts of 1882 are legislative in their character is not only obvious on their face but is, if possible, still more clear from the fact that, as we have seen, many State legislatures have passed similar acts. Are they in conflict with any portion of our constitution? They seem to me obviously not in conflict with the 39th section of article 6 of our constitution (p. 18, 19 of acts of 1872–'3). That article provides that "in no case shall a special act be passed where a general law would be proper and can be made applicable to the case." The act under consideration and sections 9 and 15 thereof seem to me
44 so obviously not special acts that it surprised me to find that such a law had ever been deemed to be a special act and in violation of this section; but it seems that claim has been made. In Spinney *ex parte*, 10 Nev., 326, such a law as this was decided not to be in conflict with a similar provision in the Nevada constitution.

Article III of our constitution, our bill of rights, section 1 (see acts of 1872–'3, p. 5), provides that "all men are by nature equally free and independent and have certain inherent rights of which, when they enter into a state of society, they cannot by any compact deprive or divest their posterity, namely, the enjoyment of life and liberty, with the means of acquiring and possessing property and of possessing and obtaining happiness and safety." The law which we are considering is claimed to conflict with this provision of our bill

of rights. Of course, every man has the right to use the means of acquiring property, but the means which he uses must be lawful means. He cannot acquire property by stealth or robbery. In so doing he would infringe on the rights of others, on their right (under this very provision of our bill of rights) to possess property. So he cannot have a right to acquire property by the practice of medicine if he has no qualifications to practice medicine, and if in his attempt to do so he destroys the health of others in violation of the law of the land. Therefore the Legislature has a right by law to declare that he shall not acquire property by the practice of medicine unless he possesses the requisite qualifications and there can be given to the community some assurance that he will not destroy the health of others. For how can others enjoy their life, as provided for by this section of our bill of rights, if any quack has the absolute right to destroy life by his attempt to practice medicine? The Legislature, therefore, in declaring what shall be the qualifications of a person before he shall acquire property by practicing medicine, does not violate this provision of our bill of rights.

Of course the courts have no right to decide or consider whether the Legislature has acted wisely in determining what are the requisite qualifications which one must possess before he can practice medicine, or whether the Legislature has adopted a wise mode of determining whether such qualifications are possessed by one who wishes to practice medicine. This is obviously a purely legislative question. For this court to undertake to say that the legislative act fixing these qualifications and declaring how they are to be shown to exist was to be treated as a nullity, and that the courts should, as insisted by counsel, themselves determine whether such qualifications existed in each particular case, would be a bold usurpation of authority by this court, and would directly violate article V of our constitution (acts of 1872-'3, page 11), which declares: "The legislative, executive, and judicial departments shall be separate and distinct, so that neither shall exercise the power properly belonging to the other."

This section 1 of our bill of rights is probably the only one peculiar to this State which would be supposed to have any effect on the question whether the Legislature had a right to pass sections 9 and 15 of chapter 93 of the acts of 1882. The truth is that this and other general declarations of rights relied on by the counsel for the plaintiff in error, as well as numerous general declarations of rights laid down by text-writers and relied on by the counsel for the plaintiff in error, have really no bearing on the question under discussion. If this court should, under any such law and general declarations as to what should be proper functions of government, undertake to declare void an act of the Legislature which, according to our notions, violated these indefinite fundamental principles of government simply because we deemed the legislative action, though within the scope of their authority, arbitrary, unjust, or oppressive, we would ourselves be clearly usurping authority; and I cannot see that the situation of our citizens would be improved by being subject to the arbitrary and unlimited control of the courts. On the con-

trary, it seems to me that this would constitute the worst of all tyrannies.

It is complained that the State board of health created by chapter 93 of acts of 1882 and by this section 9 are made autocrats, with arbitrary and tyrannical powers conferred on them, and that they can at pleasure decide what college is a reputable college. This provision of the law, if objectionable at all, can only be found
46 fault with because what constitutes a reputable college as distinguished from a disreputable one is so vague as necessarily to leave to the members of the board of health a rather indefinite discretion, but it is on this account not more objectionable than a discretion conferred on medical examiners to decide whether the applicant possesses a moral character, and yet statute laws containing such a provision have been sustained as valid. (Thompson *v.* Huger, 25 Me., 104, and Wert *v.* Clutter, 37 Ohio St., 347.)

This objection has not, however, been specially argued by the counsel for the plaintiff in error. His argument has been based on what seems to me to be a total misapprehension of the distinction which must always be respected in every republican government between questions which are legislative and those which are judicial. His arguments, based on general principles laid down by text-writers as to the legitimate functions of government, are arguments which should be addressed to the Legislature and not to the courts. As a specimen of them I will quote briefly from his written brief. He charges that the powers conferred on the board of health are arbitrary and tyrannical, because, to use his language, they are authorized "to decide what are the necessary qualifications in each individual case, and admit or reject the applicant as they see fit. They may admit to practice an applicant who does not know his stomach from his brains, or through ill-will, party influence, or a domineering spirit reject an applicant who may know more and be a better practitioner than the combined board." These may be sound reasons why the Legislature should have guarded as far as possible in the law against such evils, but they are very poor reasons why no such law should be passed. It is obvious that every law, no matter how necessary, may be executed by those entrusted with carrying it out in an unjust and oppressive manner. The Legislature in this case seems to have considered well the necessity of avoiding the unjust, foolish, and oppressive execution of this law, as far as it could be done, by providing that the members of this board of health should be appointed by the Governor, and that, as officers of the State, they should take an oath to faithfully perform their duties, and that they should be graduates of a respectable medical college, who had practiced medicine continuously for not
47 less than twelve years. As a further preventive of abuses, each of the members of this board is removable at the pleasure of the Governor. If these provisions should prove inadequate to prevent the abuse of their power the Legislature must be applied to by those who are injured to provide other precautions; or, if necessary, to repeal the law. But while it remains a law it must be enforced by the courts.

For these reasons I am of opinion that the judgment of the circuit court of April 12, 1883, must be affirmed, and that the defendant in error must recover of the plaintiff in error its costs in this court expended and thirty dollars damages.

Affirmed.

I, O. S. Long, clerk of the supreme court of appeals of West Virginia, hereby certify that the foregoing printed pages contain a true copy of the opinion of the court in the case of the State of West Virginia *vs.* F. M. Dent.

In testimony whereof I have hereunto set my hand and affixed the seal of our said supreme court of appeals this 19th day of October, 1885, and in the 23rd year of the State.

[Seal Supreme Court of Appeals, West Virginia.]

O. S. LONG.

48 We, M. H. Dent, attorney for plaintiff in error, and Alfred Caldwell, attorney for defendant in error, do hereby stipulate and agree that the within opinion of the supreme court of appeals of the State of West Virginia in the case of the State against Frank M. Dent, having been omitted from the record of the case now on file in the Supreme Court of the United States, may now be added to, annexed, and made a part of said record the same as if the clerk had originally copied the same therewith.

M. H. DENT,
Attorney for Plaintiff in Error.
ALFRED CALDWELL,
Attorney for Defendant in Error.

49 [Endorsed:] Supreme Court U. S. 1885, Oct'r term. No. 390. Frank M. Dent, pl'ff in error, *vs.* The State of West Va. Stipulation of counsel & addition to record.

[Stamped:] Office Supreme Court U. S. Filed Nov. 2, 1885. James H. McKenney, clerk.

Endorsed on cover: West Virginia supreme court of appeals. No. 390. Frank M. Dent, plaintiff in error, *vs.* The State of West Virginia. Filed October 13, 1885.

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CLERK.

IN THE

SUPREME COURT

OF THE

UNITED STATES OF AMERICA.

FRANK M. DENT, *Plaintiff in Error,*

vs.

STATE OF WEST VIRGINIA, *Defendant in Error.*

ARGUMENT IN BEHALF OF PLAINTIFF IN ERROR.

STATEMENT OF CASE.

IN THE

SUPREME COURT

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UNITED STATES OF AMERICA.

FRANK M. DENT, *Plaintiff in Error,*

vs.

STATE OF WEST VIRGINIA, *Defendant in Error.*

ARGUMENT IN BEHALF OF PLAINTIFF IN ERROR.

STATEMENT OF CASE.

Frank M. Dent, Plaintiff in Error, a native resident of the State of West Virginia and citizen of the United States, began the practice of medicine at the town of Newburg, county of Preston and said State, in the year 1876, complying fully with all the laws of the State respecting his profession in existence at that time and continued in practice up until June, 1882. In the meantime, by diligence, care and attention he built himself up and was in the full enjoyment of a lucrative practice when in said year 1882 the Legislature of said State passed an act styled "Concerning the

public health," which among others contained the following sections, to-wit:

"9. The following persons and *no others* shall hereafter be permitted to practice medicine in this State, viz:

"*First*—All persons who are graduates of a reputable medical college in the school of medicine to which the person desiring to practice belongs. Every such person shall if he has not already done so, and obtained the certificate hereinafter mentioned, present his diploma to the State Board of Health, or to the two members thereof in his Congressional district, and if the same is found to be genuine, and was issued by such medical college as is hereinafter mentioned, and the person presenting the same be the graduate named therein, the said board or said two members thereof (as the case may be), shall issue and deliver to him a certificate to that effect; and such diploma and certificate shall entitle the person named in such diploma to practice medicine in all its departments in this State.

"*Second*—All persons who have practiced medicine in this State, continuously, for the period of ten years prior to the eighth day of March, one thousand eight hundred and eighty-one. Every such person shall make and file with the two members of the State Board of Health in the Congressional district in which he resides, or if he resides out of the State, in the district nearest his residence, an affidavit of the number of years he has continuously practiced in this State, and if the number of years therein stated be ten or more, the said board or said two members thereof shall, unless they ascertain such affidavit to be false, give him a certificate to that fact and authorizing him to practice medicine in all its departments in this State.

"*Third*—A person who is not such graduate and who has not so practiced in this State for a period of ten years, desiring to practice medicine in this State, shall, if he has not already done so, present himself for examination before the State Board of Health or before the said two members thereof in the Congressional district in which he resides, or if he resides out of this State, to the said two members of the State Board of Health in the Congressional district nearest his place of residence, who, together with a member of the local board of health who is a physician (if there be such a member of the local board), of the county in which the examination is held shall examine him as herein provided; and if upon examination, they find him qualified to practice medicine in

all its departments, they, or a majority of them, shall grant him a certificate to that effect. and thereafter he shall have the right to practice medicine in this State to the same extent as if he had the diploma and certificate hereinbefore mentioned. The members of the State Board of Health in each Congressional district shall by publication in some newspaper printed in the county in which their meeting is held, or if no such paper is printed therein, in some newspaper of general circulation in such district, give at least twenty days notice of the time and place at which they will meet for the examination of applicants for permission to practice medicine, which notice shall be published at least once in each week for three successive weeks before the day of such meeting. But this section shall not apply to a physician or surgeon who is called from another State to treat a particular case or to perform a particular surgical operation in this State, and who does not otherwise practice in this State.

"15. If any person shall practice, or attempt to practice, medicine, surgery, or obstetrics in this State without having complied with the provisions of section nine of this chapter, except as herein provided, he shall be deemed guilty of a misdemeanor and fined for every such offense not less than fifty nor more than five hundred dollars, or imprisoned in the county jail not less than one month nor more than twelve months, or be punished by both such fine and imprisonment, at the discretion of the court."

Acts of West Virginia, 1882, *pages* 245, 246, 247.

By virtue of which sections the said Frank M. Dent was indicted for continuing the practice of his profession and being arraigned before the circuit court of Preston county, in said State, admitted his breach of the act, but moved in arrest of judgment that said act so far as it interfered with his continuing in his profession was contrary to the XIV Amendment to the Constitution of the United States and was therefore null and void, but said circuit court overruled his motion and entered judgment against him. He appealed to the Supreme Court of said State, which affirmed said judgment. He then applied for and obtained a writ of error from the judgment of said Supreme Court to this Court, and now here insists on the following

ASSIGNMENT OF ERROR:

I. That the provisions of the sections of the act quoted above

to the extent they deprive plaintiff of his vested rights and estate in his profession are contrary to that provision of the XIV Amendment to the Constitution of the United States, which provides that "No State shall deprive any person of life, liberty or property without due process of law," and therefore null and void, and the Supreme Court of the State erred in affirming said act to be constitutional in this respect.

ARGUMENT.

Plaintiff insists that said act by forfeiting his right to continue in the practice of his profession

First: Destroys his vested rights and deprives him of the estate he had acquired in his profession by years of study practice, diligence and attention.

Second: Deprives him of the benefit of an established reputation as a practitioner.

Third: Depreciates, destroys, and hence deprives him of the value of his invested capital in books medicines and instruments.

In *Cummins* v. *State of Missouri*, 4 Wall. 320, Judge Field in delivering the opinion of the court says:

"The learned counsel does not use the terms life, liberty and property as comprehending *every right* known to law. He does not *include under property those estates which one may acquire in professions, though they are often the source of the highest emoluments and honors.*"

And in *exparte Garland*, 4 Wall. 333:

"The attorney and counsellor being by the solemn judicial act of the court clothed with his office, does not hold it as a matter of grace and favor. The right which it confers upon him to appear for suitors and to argue causes is something more than a mere indulgence, revokable at the pleasure of the court or at the *command of the Legislature.* It is a right of which he can only be deprived by the judgment of the court for moral or professional delinquency."

Mr. Blackstone in commenting on the terms life, liberty and property says:

"In these several articles consist the *rights,* or as they are frequently termed, the *liberties* of Englishmen; liberties more generally talked of than thoroughly understood, and yet highly necessary to be perfectly known and considered by every man of rank and property lest his ignorance of the points whereon they are

founded should hurry him into faction and licentiousness on the one hand or a pusillanimous indifference and criminal submission on the other, and we have seen that these rights consist primarily in the free enjoyment of personal security, personal liberty and of private property. So long as these remain inviolate the subject is *perfectly free; for every oppression must act in opposition to one or other of these rights, having no other object on which it can possibly be employed.*"

Also:

"The third absolute right inherent in every Englishman is that of property, which consists in the free use, enjoyment and disposal of *all* his *acquisitions* without any control or diminution save only by the law of the land."

From these authorities the conclusion is inevitable that the terms life, liberty and property, as used in the Constitution, were intended to comprehend *every right* known to the law which might in any manner become the object of State oppression, and that a man's estate in his profession and the right to the enjoyment of his acquired reputation are as certainly included in the meaning of these terms as his lands and chattels. For the State to enact a law forbidding a man the enjoyment of his own house without the consent of an arbitrary board of examiners is no more unjust than to provide that a man shall not enjoy the benefits of an established practice without a like consent. In either case he is deprived of his vested rights and property by a process rather ministerial than judicial and wholly different from that which is meant by due process of law, the judgment of his peers, or the law of the land. His land cannot be taken from him except by the intervention of an impartial jury of his countrymen; his hard earned reputation and professional practice should not be less secure.

It was no crime for him to engage in the practice, and having become established in it the State ought to have no authority to deprive him of the right to continue in it except for moral or professional delinquency, ascertained by the verdict of an impartial jury of his peers.

In this case the State finds the plaintiff in the full enjoyment of a lucrative practice, the fruits of six years of attention to his profession, with his means invested in necessary medical works, instruments and remedies, forfeits his right to continue in the enjoyment thereof and proceeds to enforce the forfeiture by fine and imprisonment.